Tchatat v. The City Of New York , et al Doc. 336

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSIAS TCHATAT,
Plaintiff,

-against-

POLICE OFFICER LIAM O'HARA, et al.,
Defendants.

14 Civ. 2385 (LGS)

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

Plaintiff Josias Tchatat filed this action against Defendants NYPD Officers Liam O'Hara and Harry Arocho, among others, alleging false arrest, malicious prosecution, denial of the right to a fair trial (i.e., fabrication of evidence) and conspiracy under 42 U.S.C. § 1983. O'Hara and Arocho, the only remaining Defendants, move for summary judgment. Plaintiff cross-moves for leave to amend the Complaint to reinstate his *Monell* claim against Defendant the City of New York (the "City"). Plaintiff also objects to Magistrate Judge Gabriel W. Gorenstein's Opinion and Order denying his motion for spoliation sanctions. For the reasons below, Defendants' motion is granted as to Arocho and denied as to O'Hara. Plaintiff's cross-motion is denied and his objection is overruled.

I. BACKGROUND

The facts below are drawn from the parties' 56.1 statements and other submissions on this motion, and are construed in Plaintiff's favor. *See Soto v. Gaudett*, --- F.3d. ----, No. 15-3764, 2017 WL 2854323, at *5 (2d Cir. July 5, 2017).

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A. The Arrest

On September 20, 2011, Plaintiff was in a Best Buy store. At his request, Best Buy employee Jessica Deleston opened the bathroom door for him. After leaving the bathroom, Plaintiff purchased a USB drive.

As Plaintiff was exiting the store, a security guard, Shwon Edmonds, and several Best Buy employees, including Richard Castellano, stopped Plaintiff and accused him of stealing something. They brought him to a security holding room. Castellano left the room to summon the police. Edmonds ordered Plaintiff to turn around so that he could handcuff him. When Plaintiff refused, Edmonds and several employees attacked Plaintiff. They repeatedly punched and kicked him. Plaintiff did not fight back and was ultimately handcuffed while in a fetal position on the ground.

Defendant Officers O'Hara and Arocho arrived at the store after the altercation had ended. Although O'Hara and Arocho did not know any of the staff working that day, O'Hara had been to the same Best Buy store many times in response to reports of shoplifting. When the officers entered the security room, Plaintiff was handcuffed and on the ground. O'Hara left with Castellano, while Arocho stayed in the room with Plaintiff. While in the room, Arocho spoke with Edmonds and the other employees, discussing "personal things that had nothing to do with the events." When Arocho asked Plaintiff why he was sweaty, Plaintiff responded that he "had just been attacked" and had been handcuffed "for having done nothing at all." Plaintiff also said that he was in pain, and Arocho replied that they would take him to the hospital. Arocho remained in the room with Plaintiff the entire time until Plaintiff was removed. While he was at the store, Plaintiff, and by implication Arocho, never heard anyone tell the police officers that Plaintiff had stolen something or that Plaintiff had hit someone.

O'Hara spoke with Edmonds and the Best Buy employees about what had happened. He asked them to show him the property that Plaintiff allegedly had tried to steal along with a receipt for its value, and "to sign affidavits swearing that their version of events were true." These were "routine questions" and the staff was "aware of the procedure." In O'Hara's presence, Best Buy employee Van Mobley executed two forms under penalty of perjury, which O'Hara described as "the routine affidavit signing." On one form, an NYPD Complainant's Report of Lost or Stolen Property, Mobley stated that the stolen article was "1 Sandisk" valued at $9.99. On the second form, a "Shoplifting/Trespass Supporting Deposition," Mobley attested that he had observed Plaintiff remove "1 camera memory card" from a rack and conceal the memory card in his "[f]ront right pants pocket." Mobley also attested that he recovered the memory card from the "front right pants pocket." Edmonds apparently did not sign any forms the day of the incident.

When O'Hara came back into the room, Plaintiff asked if he had the receipt from Plaintiff's purchase. O'Hara said yes, but that no one "is going to believe you because you're a criminal." Using his personal cell phone, O'Hara took photographs of Edmonds' face, but did not take any photographs of Plaintiff, even though O'Hara was aware that Edmonds did not require medical attention from the incident. Arocho recorded in his memo book Edmonds' name and contact information. Neither officer asked to see any in-store surveillance footage.

Arocho placed police handcuffs on Plaintiff and the officers took him to the precinct for processing. Arocho and O'Hara took Plaintiff to the hospital, where he was treated, and then brought him back to the precinct.

While at the store, O'Hara had collected memory card packaging, which was torn, and the receipt that the Best Buy staff had generated to show the memory card's value. After taking

a photograph of the packaging at the precinct, O'Hara vouchered the photograph and receipt as arrest evidence. He returned the packaging to the store. Although Edmonds gave the officers the memory card, O'Hara does not remember what happened to it, and it was never returned to the store.

On the day of his arrest, Plaintiff did not steal or attempt to steal a memory card, nor did he touch any product other than the USB drives that he was interested in buying.

B. The Criminal Prosecution

The day after the incident, O'Hara signed a criminal complaint prepared by the District Attorney's Office. It charged Plaintiff with petit larceny, criminal mischief in the fourth degree and attempted assault in the third degree. In the criminal complaint, O'Hara recounted the facts as described on the forms that Mobley had signed the day before. O'Hara further attested in the criminal complaint that Edmonds had informed him that:

> after defendant was stopped by [Mobley] for the above-described conduct, [Edmonds] observed the defendant forcibly strike [Edmonds'] head with defendant's head one (1) time, causing [Edmonds'] eye glasses to break and [Edmonds] to suffer from redness and pain to his head.

Both Mobley and Edmonds signed forms called Supporting Depositions affirming the truthfulness of the statements attributed to them in the criminal complaint. Edmonds added a note to his form that Plaintiff had head-butted him three times.

Plaintiff was indicted by a grand jury on charges of robbery in the second degree and robbery in the third degree. O'Hara testified in the grand jury only about Edmonds' appearance and that he had arrested Plaintiff. He did not testify about what Edmonds or any Best Buy employee had told him about the events leading up to Plaintiff's arrest.

Before Plaintiff's criminal trial, O'Hara lost the cell phone that contained the photographs of Edmonds' face. O'Hara testified in this case that he did not recall how he lost his cell phone or whether he ever intended to voucher the photographs into evidence.

On April 5, 2013, Plaintiff was tried before a jury and acquitted of all charges. O'Hara testified at Plaintiff's criminal trial about Edmonds' appearance, the lost cell phone with the Edmonds photographs, the photograph that O'Hara vouchered of the memory card packaging, returning the empty packaging to the store "as it was their merchandise and I guess they hoped to sell it," the receipt that he vouchered to show the value of the property and his lack of recollection as to whether he ever had the actual memory card. He apparently did not testify about what anyone had told him about what transpired before he arrived at the Best Buy the day of the incident.

C. Mobley's and Deleston's Depositions in this Action

Mobley's deposition testimony contradicts the affidavit he signed on the date of Plaintiff's arrest and the statements attributed to him in the criminal complaint. Mobley testified that he did not personally see Plaintiff put a memory card in his pants nor did he personally recover a camera memory card from him. Rather, as Mobley testified, his co-worker, Deleston, had said to him that "she had let somebody in the bathroom and he had a product in his hand." Mobley attested that after hearing this, he went into the bathroom and heard "packaging being wrestled with" in one of the stalls.

Deleston testified in her deposition that she saw Plaintiff put one SanDisk memory card in his pants. She further testified that after she saw him place the memory card there, Plaintiff "turned around," "noticed that there was an employee" and asked her if he could use the bathroom. Deleston left the Best Buy store before O'Hara and Arocho arrived. Deleston did not

testify at Plaintiff's criminal trial, although she had been subpoenaed, and the prosecution at one point had expected her to testify.

D. Procedural History

Plaintiff commenced this lawsuit against the City, O'Hara, Arocho, Best Buy, Castellano, Deleston, Mobley and Edmonds, among other parties. The City was dismissed on the ground that the Complaint failed to state a claim for municipal liability under *Monell*. *See Tchatat v. City of New York*, No. 14 Civ. 2385, 2015 WL 5091197, at *9–11 (S.D.N.Y. Aug. 28, 2015) (citing *Monell v. Dep't of Social Servs. of the City of New York*, 436 U.S. 658, 691 (1978)). Plaintiff eventually resolved his claims against all the remaining Defendants, except O'Hara and Arocho. Plaintiff moved for spoliation sanctions against O'Hara and Arocho. Judge Gorenstein, who had supervised discovery, denied the motion. *Tchatat v. O'Hara*, No. 14 Civ. 2385, 2017 WL 1379097 (S.D.N.Y. Apr. 14, 2017). Plaintiff timely objected. O'Hara and Arocho move for summary judgment. Plaintiff opposes, and cross-moves for leave to amend the Complaint to reinstate the *Monell* claim against the City.

II. SUMMARY JUDGMENT

A. Standard

Summary judgment is appropriate when the record before the court establishes that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute as to a material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the initial burden of informing the court of the basis for the summary judgment motion and identifying those portions of the record that demonstrate the absence of a genuine dispute as to any material fact. Fed. R. Civ. P.

56(c)(1); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Victory v. Pataki*, 814 F.3d 47, 58–59 (2d Cir. 2016). Courts must construe the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in the non-moving party's favor. *See Anderson*, 477 U.S. at 255. "[A] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (citation omitted). Instead, a party asserting that a fact is genuinely disputed "must support the assertion" by citing to the record or showing that "the materials cited do not establish the absence or presence of a genuine dispute." Fed. R. Civ. P. 56(c).

B. False Arrest

Defendants' motion for summary judgment on the false arrest claim is (i) denied as to O'Hara because the evidence is sufficient for a reasonable jury to find that O'Hara lacked probable cause to arrest Plaintiff and (ii) granted as to Arocho because he was entitled to rely on O'Hara's purported investigation and, on that basis, had probable cause to arrest.

"In analyzing § 1983 claims for unconstitutional false arrest, [the Second Circuit] generally look[s] to the law of the state in which the arrest occurred." *Dancy v. McGinley*, 843 F.3d 93, 107 (2d Cir. 2016). "Under New York law, a false arrest claim requires a plaintiff to show that the defendant intentionally confined him without his consent and without justification." *Id.* (internal quotation marks omitted). Probable cause "is an absolute defense" and "exists when the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Id.* (internal quotation marks omitted). Probable cause is determined based on the facts known to the arresting officer at the time of the arrest. *Figueroa v. Mazza*, 825 F.3d 89, 100 (2d Cir. 2016).

"[P]robable cause exists if a law enforcement officer received information from some person, normally the putative victim or eyewitness, unless the circumstances raise doubt as to the person's veracity." *Betts v. Shearman*, 751 F.3d 78, 82 (2d Cir. 2014) (internal quotation marks and alterations omitted). Probable cause does not lie where "a defendant knows that witness statements are false or coerced." *Berry v. Marchinkowski*, 137 F. Supp. 3d 495, 527 (S.D.N.Y. 2015) (internal quotation marks omitted). "[P]robable cause can exist even where it is based on mistaken information, so long as the arresting officer acted reasonably and in good faith in relying on that information." *Bernard v. United States*, 25 F.3d 98, 102 (2d Cir. 1994); *accord Simpson v. Town of Warwick Police Dep't*, 159 F. Supp. 3d 419, 436 (S.D.N.Y. 2016).

"When making a probable cause determination, police officers are entitled to rely on the allegations of fellow police officers. Absent significant indications to the contrary, an officer is entitled to rely on his fellow officer's determination that an arrest was lawful." *Panetta v. Crowley*, 460 F.3d 388, 395 (2d Cir. 2006) (internal quotation marks and citations omitted); *accord Robinson v. City of New York*, No. 15 Civ. 5850, 2017 WL 2414811, at *6 (S.D.N.Y. June 2, 2017).

A reasonable jury could conclude that, at the time of the arrest, O'Hara lacked a reasonable basis to suspect Plaintiff had committed a crime and, instead, collaborated with the Best Buy employees and security personnel to falsify accusations. First, Plaintiff adduces evidence that supports the inference that O'Hara purposely disposed of the physical evidence that would supposedly implicate Plaintiff and retained only a photograph of the memory card packaging that Plaintiff allegedly ripped open and threw away. Construing the facts in the light most favorable to Plaintiff, the photographs of Edmonds would have shown that he was not injured -- injury being a necessary element for robbery in the second degree in this case, *see* N.Y.

Penal Law § 160.10(2)(a); and the memory card and its packaging could have been subjected to fingerprint analysis revealing none of Plaintiff's fingerprints. The two items that O'Hara did voucher -- the photograph of the torn packaging and the hypothetical receipt that would have been generated had the memory card been purchased -- have no probative value on the issues of whether Plaintiff stole anything or hit anyone.

A reasonable jury also could find that O'Hara's explanation regarding the "lost" evidence is dubious. As to the photos of Edmonds, which O'Hara took with his personal cell phone, he did not take any steps to preserve them, either passively or intentionally; he took no steps to voucher them and could not recall if he even had intended to voucher them; and several months later he lost his phone and all of its contents under circumstances he claims not to remember. As to the memory card, the object of value that Plaintiff allegedly stole and that allegedly was recovered from his pocket, O'Hara does not remember what happened to it. As to the packaging, he testified that he returned it to Best Buy so the store could "sell the merchandise," even though he acknowledged that the package was ripped and empty. O'Hara's role regarding the missing evidence supports an inference that O'Hara knew it could undermine the story he concocted with the Best Buy employees and disposed of it.

Second, Plaintiff's assertion that O'Hara conspired with Best Buy employees to make a case against Plaintiff is supported by the contradictions in Mobley's account of the events, which formed the basis for the accusations against Plaintiff. Mobley initially signed sworn statements on police forms in front of O'Hara that became the basis for the criminal complaint sworn to by O'Hara as the arresting officer. Mobley swore on the forms that he saw Plaintiff take the memory card and that he recovered the memory card from Plaintiff. He later testified that he did neither thing. A reasonable jury could conclude that Mobley was lying at the time of the arrest

in collaboration with, or at the behest of, O'Hara. When coupled with the evidence that could support the inference that O'Hara purposely mishandled evidence, there is a genuine factual dispute about whether O'Hara knew that the version of events to which Mobley initially attested was false.

Defendants argue that they had probable cause to arrest Plaintiff, and no reasonable jury could find otherwise based on what the Best Buy employees and the security personnel told them. In support, they cite cases that dismissed § 1983 claims against officers who arrested individuals based on allegedly false reports from store employees or security guards. *See, e.g.*, *Villa v. City of New York*, No. 11 Civ. 1699, 2013 WL 1385207, at *3–4 (S.D.N.Y. Mar. 14, 2013); *Awelewa v. N.Y.C.*, No. 11 Civ. 778, 2012 WL 601119, at *4 (S.D.N.Y. Feb. 23, 2012). These cases are distinguishable because, unlike this case, they did not include any factual allegations and evidence that the defendant police officer had conspired with the store employees to accuse falsely the § 1983 plaintiff.

Defendants further argue there is no evidence that the officers conspired with the store staff "given that the officers and the staff at Best Buy working that day had no knowledge of each other before the officers arrived at Best Buy in response to this incident." While evidence of pre-existing relationships may support an inference that the officers collaborated with the putative victim, *see, e.g.*, *McGee v. Doe*, 568 F. App'x 32, 38 (2d Cir. 2014) (summary order), it is not required.

Because an issue of fact exists as to whether O'Hara merely relied on the Best Buy employees' rendition of events, or was complicit with them in falsely accusing Plaintiff, summary judgment is denied as to O'Hara on the false arrest claim.

Arocho in contrast was entitled to rely on O'Hara's apparent assessment of probable cause, whether that assessment was mistaken or a sham. Arocho remained with Plaintiff in the security room while O'Hara gathered information and ostensible evidence about what had happened. In contrast to O'Hara, nothing in the record suggests that Arocho had any part in handling the physical evidence, taking Mobley's false statements or otherwise participating in any collusive effort by Edmonds and the Best Buy employees to justify their mistreatment of Plaintiff after the fact. Summary judgment is granted on the false arrest claim as to Arocho.

C. Malicious Prosecution

Defendants argue that they are entitled to summary judgment on the malicious prosecution claim because Defendants had probable cause to prosecute Plaintiff and any prosecution was not initiated maliciously. Summary judgment is granted on this basis as to Arocho but denied as to O'Hara.

To succeed on a malicious prosecution claim under 42 U.S.C. § 1983, a plaintiff must demonstrate (1) "the commencement or continuation of a criminal proceeding against [him]," (2) "the termination of the proceeding in [his] favor," (3) "that there was no probable cause for the proceeding," (4) "that the proceeding was instituted with malice," and (5) "a seizure or other perversion of proper legal procedures implicating the claimant's personal liberty and privacy interests under the Fourth Amendment." *Mitchell v. City of New York*, 841 F.3d 72, 79 (2d Cir. 2016) (citations omitted).

The existence of probable cause defeats a claim of malicious prosecution, *Betts*, 751 F.3d at 82 (2d Cir. 2014), "and indictment by a grand jury creates a presumption of probable cause," *Manganiello v. City of New York*, 612 F.3d 149, 162 (2d Cir. 2010) (internal quotation marks omitted). "That presumption may be rebutted only by evidence that the indictment was procured

by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith." *Id.* (internal quotation marks omitted). "[T]he plaintiff's avenue for rebuttal is not limited to proof of misconduct in the grand jury alone. Rather, the plaintiff may show that the officer misrepresented the facts to the District Attorney or otherwise acted in bad faith in a way that led to the indictment." *Creighton v. City of New York*, No. 12 Civ. 7454, 2017 WL 636415, at *35 (S.D.N.Y. Feb. 14, 2017) (quoting *Manganiello v. Agostini*, No. 07 Civ. 3644, 2008 WL 5159776, at *5 (S.D.N.Y. Dec. 9, 2008), *aff'd*, *Manganiello*, 612 F.3d 149)); *accord Rothstein v. Carriere*, 373 F.3d 275, 283 (2d Cir. 2004) ("The presumption [of probable cause created by a grand jury indictment] may be overcome only by evidence establishing that the police witnesses have not made a complete and full statement of facts either to the Grand Jury or to the District Attorney, that they have misrepresented or falsified evidence, that they have withheld evidence or otherwise acted in bad faith." (internal quotation marks omitted)).

A reasonable jury could find that O'Hara participated in fabricating and forwarding false accusations that formed the basis for the criminal complaint and subsequent prosecution. It also could find that O'Hara knowingly failed to preserve or disclose to the District Attorney's Office evidence related to the alleged theft and altercation, including the physical evidence connecting Plaintiff to the crime and the photographs of Edmonds' face. The evidence is sufficient to create an issue of fact on the defense of probable cause. *See, e.g.*, *Manganiello*, 612 F.3d at 162 ("Where there is some indication in the police records that, as to a fact crucial to the existence of probable cause, the arresting officers may have lied in order to secure an indictment, and a jury could reasonably find that the indictment was secured through bad faith or perjury, the presumption of probable cause created by the indictment may be overcome." (internal quotation marks omitted)); *Deanda v. Hicks*, 137 F. Supp. 3d 543, 575 (S.D.N.Y. 2015) ("[A]n arresting

officer may be held liable for malicious prosecution when a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors . . . or when [he or] she withholds relevant and material information."); *Bugliaro v. City of New York*, No. 10 Civ. 4881, 2013 WL 2399656, at *3 (E.D.N.Y. May 31, 2013) (denying summary judgment on malicious prosecution claim against the defendant police officer, citing evidence that the defendant police officer may have made a false statement on a criminal complaint and destroyed video in police custody).

"[A]ctual malice can be inferred when a plaintiff is prosecuted without probable cause." *Rentas v. Ruffin*, 816 F.3d 214, 221–22 (2d Cir. 2016). In light of the genuine factual dispute regarding probable cause and O'Hara's alleged role in forwarding knowingly false statements to the prosecutors and failing to disclose physical evidence, there is a genuine factual dispute as whether O'Hara acted with malice in connection with Plaintiff's prosecution. *See id.*

As with the false arrest claim, Arocho is entitled to summary judgment on the malicious prosecution claim. As explained, there is no evidence that Arocho took part in any of the alleged misconduct involving O'Hara, Edmonds and the Best Buy employees. There is also no evidence that Arocho commenced or continued the criminal proceedings against Plaintiff. "A jury may permissibly find that a defendant initiated a prosecution where he filed the charges or prepared an alleged false confession and forwarded it to prosecutors." *Manganiello*, 612 F.3d at 163 (internal quotation marks omitted). Arocho did not sign the criminal complaint, and Plaintiff fails to adduce evidence that Arocho had any dealings with the District Attorney's Office.

D. Denial of the Right to a Fair Trial (Fabrication of Evidence)

Summary judgment is denied as to O'Hara and granted as to Arocho on the fair trial claim. "When a police officer creates false information likely to influence a jury's decision and

forwards that information to prosecutors, he violates the accused's constitutional right to a fair trial, and the harm occasioned by such an unconscionable action is redressable in an action for damages under 42 U.S.C. § 1983." *Betts*, 751 F.3d at 83–84 (quoting *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997)). The elements of a fair trial claim based on fabrication of information are "(1) [an] investigating official (2) fabricates information (3) that is likely to influence a jury's verdict, (4) forwards that information to prosecutors, and (5) the plaintiff suffers a deprivation of life, liberty, or property as a result." *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 279 (2d Cir. 2016). For the reasons discussed above, issues of fact exist as to whether O'Hara fabricated critical information resulting in Plaintiff's loss of liberty. Likewise, based on the lack of evidence discussed above, summary judgment is granted as to Arocho.

E. Conspiracy

Summary judgment is denied on the conspiracy claim against O'Hara and granted as to Arocho. "To prove a § 1983 conspiracy, a plaintiff must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999); *accord McGee v. Dunn*, 672 F. App'x 115, 116 (2d Cir. 2017) (summary order).

A reasonable jury could find that Plaintiff was falsely arrested and charged, and had fabricated evidence used against him in the criminal proceeding, resulting in constitutional violations. As discussed above, the evidence is sufficient to create an issue of fact as to whether O'Hara, Edmonds and at least some of the Best Buy employees conspired to bring about those

violations. Summary judgment is granted as to Arocho because, as explained, Plaintiff fails to adduce any evidence that he conspired with O'Hara, Edmonds or any Best Buy employees.

F. Qualified Immunity

O'Hara is not entitled to qualified immunity at this stage of the proceeding. "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (internal quotation marks omitted). "Whether qualified immunity can be invoked turns on the objective legal reasonableness of the official's acts," which "must be assessed in light of the legal rules that were clearly established at the time [the action] was taken." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017). "Where . . . there are facts in dispute that are material to a determination of reasonableness, summary judgment on qualified immunity grounds is not appropriate." *McKelvie v. Cooper*, 190 F.3d 58, 63 (2d Cir. 1999); *accord Simon v. City of New York*, No. 14 Civ. 8391, 2017 WL 57860, at *4 (S.D.N.Y. Jan. 5, 2017). As discussed, there are critical factual disputes about whether O'Hara acted innocently or participated with others in falsely arresting, charging and trying Plaintiff. *See, e.g.*, *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004) (defendant not entitled to qualified immunity for false arrest if there is a lack of "arguable probable cause"); *Manganiello*, 612 F.3d at 165 (defendant not entitled to qualified immunity for malicious prosecution where evidence was sufficient to find defendant "misrepresented the evidence to the prosecutors, or failed to pass on material information, or made statements that were false, and engaged in such misconduct knowingly"); *Ricciuti*, 124 F.3d at 130 (fabrication of evidence claim clearly established).

III. MOTION FOR LEAVE TO AMEND

Plaintiff moves for leave to amend the Complaint to reinstate his *Monell* claim and add allegations that he claims are supported by the discovery in this case. The motion is denied because it fails to satisfy Rule 16(b) and Rule 15(a)(2) of the Federal Rules of Civil Procedure.

A. Standard

"Leave to amend should be 'freely give[n] . . . when justice so requires,' Fed. R. Civ. P. 15(a)(2), but should generally be denied in instances of futility, undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the non-moving party." *United States ex rel. Ladas v. Exelis, Inc.*, 824 F.3d 16, 28 (2d Cir. 2016) (some internal quotation marks omitted). "A proposed amendment to a complaint is futile when it could not withstand a motion to dismiss." *F5 Capital v. Pappas*, 856 F.3d 61, 89 (2d Cir. 2017).

"Although Rule 15(a) governs the amendment of pleadings, Rule 16(b) also may limit the ability of a party to amend a pleading if the deadline specified in the scheduling order for amendment of the pleadings has passed." *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 243 (2d Cir. 2007) (citing Fed. R. Civ. P. 16(b)); *accord Motorola Sols., Inc. v. Xerox Bus. Servs., LLC*, No. 14 Civ. 206, 2016 WL 2889057, at *2 (S.D.N.Y. May 17, 2016). Under Rule 16(b)(4), a party may obtain a modification of a scheduling order "only for good cause and with the judge's consent." While the movant's "diligence" is the "primary consideration" in determining whether the movant has shown good cause, the court may also inquire whether the amendment will significantly prejudice the nonmoving party. *Kassner*, 496 F.3d at 244.

B. Application of Rule 16(b)

Plaintiff fails to show good cause to amend under Rule 16(b). The deadline to file an amended pleading lapsed in August 2014, and fact discovery ended in May 2016. To support his motion, Plaintiff relies on O'Hara's deposition testimony and his supplemental response to Plaintiff's interrogatory response. Plaintiff cannot show diligence as he has had this evidence since December 2015 and did not request leave to amend until a year later, months after fact discovery had ended. To allow amendment now, when nothing remains except trial, would significantly prejudice O'Hara and the City, which was dismissed from the case in August 2015. Plaintiff has failed to carry his burden to show good cause under Rule 16(b)(4).

C. Application of Rule 15(a)(2)

The motion to amend is also denied because it does not satisfy the requirements of Rule 15(a)(2). The proposed amendment is futile as it attempts, but fails, to state a *Monell* claim under a failure to train theory.

"[A] local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983" if the failure to train "its employees in a relevant respect . . . amount[s] to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (quoting *Canton v. Harris*, 489 U.S. 378, 388 (1989)). "A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Id.* at 62 (internal quotation marks omitted). "Without notice that a course of training is deficient in a particular respect, decision[ ]makers can hardly be said to have deliberately chosen a training

program that will cause violations of constitutional rights." *Id.* The Second Circuit has made clear that deliberate indifference under a failure to train theory has three requirements:

> First, the plaintiff must show that a policymaker knows to a moral certainty that her employees will confront a given situation. Second, the plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation. Finally, the plaintiff must show that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights.

Jenkins v. City of New York, 478 F.3d 76, 94 (2d Cir. 2007) (internal quotation marks and citations omitted) (emphasis added); *see also Walker v. City of New York*, 974 F.2d 293, 297–98 (2d Cir. 1992).

According to Plaintiff's proposed amendment, the City fails to provide its officers proper training regarding (1) evidence preservation, (2) "shop and frisk," which involves "the issue of racial profiling in retail establishments, and arrests made by members of the NYPD," (3) the handling of complaints at retail establishments, (4) the handling of cross-complaints and (5) the crimes that Plaintiff was arrested for allegedly committing. The proposed amendment further alleges that these failures to train "were a direct and proximate cause of the unconstitutional conduct alleged" in the Complaint.

The proposed amendment fails to state a claim for four reasons. First, it does not plead "a pattern of similar constitutional violations." *Connick*, 563 U.S. at 61. Plaintiff alleges, without any evidentiary support, that the Police Commissioner met with a high-profile civil rights leader in 2014 to address racial discrimination in the context of retail stores and policing. He also alleges the NYPD deputy commissioner said in 2014 that the NYPD "found that *in a small number of cases* store employees had taken to calling officers directly on their cellphones about possibly criminal behavior." These vague allegations are insufficient to support the

inference of a pattern of NYPD officers' conspiring with store employees to frame individuals for shoplifting or other charges.

Second, the proposed amendment fails to allege facts that the NYPD's "course of training is deficient *in a particular respect*." *Id.* at 62 (emphasis added). Plaintiff alleges five vague and broad issues but does not show any *particular* deficiencies in the training program. *Id.*

Third, the proposed amendment fails to allege deliberate indifference because it does satisfy the second *Jenkins/Walker* requirement. As noted, it does not adequately allege a history of NYPD officers conspiring with employees of stores to frame individuals for shoplifting or other crimes. It also fails to offer any explanation as to how the wrongdoing alleged in this case "presents the employee with a difficult choice of the sort that training . . . will make less difficult." *Walker*, 974 F.2d at 297. This is because nothing "more than the application of common sense is required" for a NYPD officer to decide not to frame an individual of wrongdoing. *Id.*

Lastly, Plaintiff's amendment fails to allege adequate causation. *See Cash v. Cty. of Erie*, 654 F.3d 324, 333 (2d Cir. 2011). The conclusory assertion that the five alleged failures to train were the "direct and proximate cause" of the constitutional violations is insufficient. Plaintiff's belated motion for leave to amend to re-instate his *Monell* claim is denied.[1]

IV. SPOLIATION SANCTIONS

Plaintiff contends that Defendants should be sanctioned for their spoliation of five pieces of evidence: (1) the cell phone photographs of Edmonds' face, (2) Edmonds' eyeglasses, (3) the memory card, (4) the memory card packaging and (5) in-store surveillance video from the date of

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[1] For the same reasons, Plaintiff's request is denied to the extent he requests leave to amend pursuant to Federal Rule of Civil Procedure 54(b).

the incident. Judge Gorenstein denied Plaintiff's motion. Plaintiff's objection to the denial is overruled.

When a party timely objects to an order on a non-dispositive pretrial matter issued by a magistrate judge, "[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). By contrast, for a "pretrial matter" that is "dispositive of a claim or defense," the magistrate judge must issue a recommendation subject to de novo review. Fed. R. Civ. P. 72(b). Courts are split on which standard of review applies to a magistrate judge's denial of spoliation sanctions that seek, as here, both dispositive and non-dispositive relief. *Compare Khatabi v. Bonura*, No. 10 Civ. 1168, 2016 WL 8838889, at *3 (S.D.N.Y. Apr. 21, 2016) (treating a ruling denying motion for sanctions, including a request for default judgment, as non-dispositive), *with Thurmond v. Bowman*, 199 F. Supp. 3d 686, 689 (W.D.N.Y. 2016) ("[A] recommendation concerning a request for sanctions in the form of dispositive relief, such as dismissal of the lawsuit, requires de novo review."). The Court need not resolve the issue because it reaches the same conclusion under either standard.

"Spoliation is the destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 148 (2d Cir. 2008). "[A] party seeking an adverse inference instruction [or some other sanction] based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Chin v.*

Port Auth. of N.Y. & N.J., 685 F.3d 135, 162 (2d Cir. 2012) (internal quotation marks omitted); *accord Michael v. Gen. Motors Co.*, No. 15 Civ. 3659, 2016 WL 3440551, at *2 (S.D.N.Y. June 14, 2016). For the relevance requirement, if the evidence is unavailable as a result of negligence, the party seeking spoliation sanctions must "adduce sufficient evidence from which a reasonable trier of fact could infer that the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction." *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 109 (2d Cir. 2002) (internal quotation marks and brackets omitted). If the evidence is destroyed in bad faith, "that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party." *Id.*

"[A] party seeking spoliation sanctions has the burden of establishing the elements of a spoliation claim by a preponderance of the evidence." *McIntosh v. United States*, No. 14 Civ. 7889, 2016 WL 1274585, at *33 (S.D.N.Y. Mar. 31, 2016) (quoting *Dilworth v. Goldberg*, 3 F. Supp. 3d 198, 200 (S.D.N.Y. 2014)). "The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis." *Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) (internal citations omitted); *accord Goonewardena v. N.Y. Workers Comp. Bd.*, No. 09 Civ. 8244, 2017 WL 2799171, at *15 (S.D.N.Y. June 28, 2017).

Plaintiff's objection as it relates to the surveillance video and Edmonds' glasses is overruled. "Spoliation sanctions are applicable only when a party loses or destroys evidence, [however,] not when he or she fails to collect it." *Creighton*, 2017 WL 636415, at *17 (S.D.N.Y. Feb. 14, 2017) (quoting *Sachs v. Cantwell*, No. 10 Civ. 1663, 2012 WL 3822220, at *9 (S.D.N.Y. Sept. 4, 2012)). Courts routinely deny sanctions against defendant police officers for

failure to collect a third-party's surveillance tapes. *See, e.g.*, *id.*; *Stern v. Shammas*, No. 12 Civ. 5210, 2015 WL 4530473, at *14 (E.D.N.Y. July 27, 2015); *Sachs*, 2012 WL 3822220, at *9. Plaintiff's argument regarding Best Buy's surveillance video and Edmonds' glasses is based solely on the fact that Defendants did not collect this evidence while at Best Buy. Plaintiff has not established that Defendants had custody or control over these items at any time, or that Defendants played a role in the loss of this evidence. Defendants' failure to seize this evidence is insufficient to justify sanctions.

Plaintiff's objection as it relates to memory card packaging, the memory card itself and the pictures of Edmonds' face is also overruled. In effect, Plaintiff asks the court to adjudicate the factual disputes that are at the heart of this case and for the jury to decide. Whether O'Hara destroyed or disposed of the evidence with a culpable state of mind, whether he was merely negligent, and whether the evidence would have been exculpatory to Plaintiff, are all critical questions that bear on the issue of Plaintiff's claims of false arrest, malicious prosecution and fabrication of evidence. As discussed, these disputed issues of fact are the issues that compel denial of the summary judgment motion. For the Court to adjudicate them now would usurp the jury's function as the trier of fact and could result in inconsistent findings. *See McGinnity v. Metro-N. Commuter R.R.*, 183 F.R.D. 58, 63 (D. Conn. 1998) ("[T]he disposition of these disputed facts and credibility issues, including any inferences which should be drawn from defendant's conduct, will be made by the jury at trial after hearing all the evidence and arguments from counsel.") (internal quotation marks and alterations omitted); *see also Castellani v. City of Atl. City*, 2016 WL 7155826, at *4 (D.N.J. Sept. 15, 2016) (denying motion for sanctions without prejudice as "[t]here is a factual dispute as to whether the document ever

existed, and consequently, the Court cannot make any determinations as to whether there was any bad faith involved in the document's destruction or non-production").

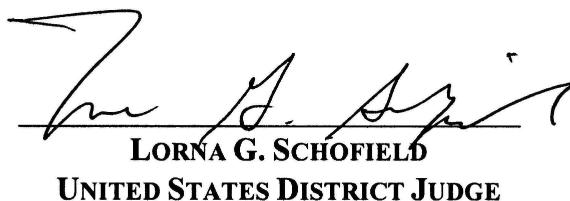
Plaintiff may nevertheless request an adverse inference instruction at trial, to be submitted with his proposed jury charge, not as a punishment but "as an example of the reasoning process known in law as circumstantial evidence, that a jury's finding of certain facts may (but need not) support a further finding that other facts are true." *Mali v. Fed. Ins. Co.*, 720 F.3d 387, 393 (2d Cir 2013) (contrasting an adverse inference instruction that is "a punishment for misconduct" with an instruction that the jury is free, but not required, to make certain inferences as a part of its "fact-finding powers").

V. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED as to Arocho and DENIED as to O'Hara; Plaintiff's motion for leave to amend is DENIED; and Plaintiff's objection to Judge Gorenstein's denial of spoliation sanctions is OVERRULED.

The Clerk of Court is respectfully directed to close the motions at Docket Number 307 and 320, and terminate Defendant Arocho from the case.

Dated: July 25, 2017
New York, New York



LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE