UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN CORBETT,

Plaintiff,

-v -

THE CITY OF NEW YORK, ROBERTO MORE, MICHAEL AHEARNE, and BRYAN GILLIS,

Defendants.

1:15-cv-09214-GHW

MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

Early in the morning of February 7, 2015, Plaintiff Jonathan Corbett was on the phone with his girlfriend when she jumped out the window of her thirty-first-floor midtown Manhattan apartment, taking her own life. He rushed to her apartment, found her lying on an adjacent roof approximately twenty-three stories below, and called 911. After speaking voluntarily with officers who arrived on the scene, Corbett ended up going to the police precinct in an NYPD vehicle, waited there for approximately 90 minutes, and then answered officers' questions for 20-30 minutes. Defendants contend that Corbett went to the precinct and remained there to answer questions voluntarily. Corbett, on the other hand, asserts that it was an unlawful detention.

Corbett filed this action, asserting claims against three NYPD officers and the City of New York ("Defendants," and as to the officer-defendants, the "Individual Defendants") pursuant to 42 U.S.C. § 1983 for false arrest or imprisonment in violation of the Fourth Amendment and for municipal liability pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978), as well as various state-law claims. In a previous opinion and order, the Court dismissed Corbett's *Monell* claims. Defendants now ask the Court to grant summary judgment in their favor on Plaintiff's false arrest claim, as well as his claim under the New York Freedom of Information Law, and to decline to exercise supplemental jurisdiction over the remainder of his state-law claims. Because triable

issues of material of fact exist, Defendants' motion for summary judgment is DENIED.

I. BACKGROUND[1]

1. Facts

On the morning of February 7, 2015, Plaintiff Jonathan Corbett was on the phone with his girlfriend of three years, Andrea Brannon. Decl. of Jonathan Corbett in Opp'n to Mot. for Summ. J. (ECF No. 95-1) ("Corbett Decl.") ¶ 1. Brannon had a history of depression and was regularly treated by a psychiatrist. *Id.* ¶ 5. She had once intentionally overdosed on prescription medication during her relationship with Corbett, and on at least two other occasions, Corbett had been concerned she might attempt suicide by jumping out her large apartment windows. *Id.* During the call that morning, Brannon made several statements implying that she would take her own life. *Id.* ¶ 6. Corbett did not think she would act on those statements, but, at some point during the call, he heard her scream, followed by a loud noise and "nothing further on the phone line." *Id.* ¶¶ 7, 9. After attempting unsuccessfully to call her back, he took a taxi to Brannon's apartment, arriving approximately fifteen minutes later. *Id.* ¶¶ 9-10. He looked out her bedroom window, which was

[1] The following facts are drawn from the parties' Local Civil Rule 56.1 Statements and other submissions in connection with the instant motion, and are undisputed or taken in the light most favorable to Plaintiff, unless otherwise noted. To the extent that Corbett responds to Defendants' supported and other sufficient Local Rule 56.1 factual assertions with a statement that he lacks the knowledge necessary to verify those assertions, the Court deems the assertions admitted. *See AFL Fresh & Frozen Fruits & Vegetables, Inc. v. De-Mar Food Servs. Inc.*, No. 06-cv-2142, 2007 WL 4302514, at *4 (S.D.N.Y. Dec. 7, 2007) (Lynch, J.) ("A nonmovant cannot raise a material issue of fact by denying statements which the moving party contends are undisputed for lack of 'knowledge and information' in part because discovery allows the party opposing summary judgment to obtain the facts necessary to determine whether it must admit or deny them."). The Court rejects Defendants' request that it disregard the statements in Corbett's declaration on the ground that they are "self-serving." A declaration is not rendered insufficient merely because it is self-serving. In fact, to disregard a declaration on that basis alone would amount to a credibility determination that is reserved for the trier of fact, not the Court on summary judgment. *See Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 57 (2d Cir. 1998) ("To hold, as defendants ask us to do, that the nonmovant's allegations of fact are (because 'self-serving') insufficient to fend off summary judgment would be to thrust the courts—at an inappropriate stage—into an adjudication of the merits."); *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 38 (2d Cir. 1994) ("It is not the province of the summary judgment court itself to decide what inferences should be drawn."). "Even a self-serving affidavit can establish a genuine dispute of fact so long as the affidavit does not contradict the witness's prior testimony." *Dye v. Kopiec*, No. 16-cv-2952 (LGS), 2016 WL 7351810, at *3 (S.D.N.Y. Dec. 16, 2016). The Second Circuit has recognized that, in "rare circumstance[s]," a district court may properly disregard self-serving testimony at the summary judgment stage where "it is so replete with inconsistencies and improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit" it. *Jeffreys v. City of New York*, 426 F.3d 549, 555 (2d Cir. 2005). No such circumstances are present here. Notably, it is difficult to imagine what evidence other than self-serving declarations or testimony Corbett could present here, given that most of the relevant events took place between only he and the Individual Defendants, with no witnesses present and without, for example, a video camera rolling.

wide open, and saw a body lying motionless on an adjacent roof approximately 250 feet below. *Id.* ¶¶ 11-12.

Immediately thereafter, at approximately 4:19 a.m., Corbett called 911 and reported what had occurred. Defs.' Local Rule 56.1 Statement (ECF No 92) and Pl.'s Local Rule 56.1 Response and Counterstatement (ECF No. 95-5) (collectively, "56.1") ¶ 1.[2] The first to arrive at the scene were two non-party officers from the New York City Police Department's Midtown South Precinct.[3] 56.1 ¶ 3. Shortly thereafter, Defendant Sergeant Roberto More and at least one additional NYPD officer, as well as members of Emergency Medical Services and the New York City Fire Department arrived on the scene. 56.1 ¶¶ 3-4; Decl. of Eviana Englert in Supp. of Mot. for Summ. J. (ECF No. 93) ("Englert Decl."), Ex. B; Englert Decl., Ex. K, Dep. of Roberto More ("More Dep.") 12:7-11, (Oct. 3, 2016). Brannon was taken to Bellevue Hospital, where she was pronounced dead at 4:57 a.m. 56.1 ¶¶ 8, 18. Defendants Detective Michael Ahearne[4] and Sergeant Bryan Gillis, as well as a non-party detective also responded to the scene and conducted preliminary interviews and a search of the apartment. *Id.* ¶¶ 17, 19.

Immediately after calling 911, Corbett took the elevator to the lobby of Brannon's building to meet the responders. Corbett Decl. ¶ 18. He approached the two first-responding NYPD officers and voluntarily provided them with information about what had happened and where to find Brannon's body. 56.1 ¶¶ 5-6. One of the officers then asked Corbett for his identification and requested that he step into the building's mailroom to further discuss what had occurred. Corbett Decl. ¶¶ 21. He gave the officer his Florida driver's license, stepped into the mailroom, and told the

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[2] The Court cites to both parties' Local Rule 56.1 statements collectively throughout this opinion, because Corbett's statement contains only his responses, and does not include Defendants' assertions.

[3] These two officers may have arrived in response to an earlier call from Brannon's neighbor immediately after hearing Brannon scream, rather than to Corbett's call. Englert Decl., Ex. D, at 1. That distinction is not material here, however.

[4] Defendant Ahearne's name is spelled incorrectly in the second amended complaint as "Aherne." The Court uses the correct spelling, as reflected in the City's response to the Court's *Valentin* order, all other correspondence from Defendants in this action, and various evidence in the record, and directs the Clerk of Court to amend the caption of this case to reflect the correct spelling.

officer about his call with Brannon and about her mental health history. *Id.* ¶¶ 22-23. The officer did not return Corbett's license to him at that time. *Id.* ¶¶ 22, 45.

At some point thereafter, Sergeant More approached and, within Corbett's earshot, told another officer to take Corbett to the precinct.[5] *Id.* ¶ 24. Either More or another nearby officer then told Corbett: "[H]old tight, you're in for a long night." *Id.* ¶ 25. More proceeded to walk away before Corbett could respond in any way to the instruction to take him to the precinct. *Id.* ¶ 26. Neither More nor any other officer asked Corbett whether he was willing to go to the precinct for further questioning, *see id.* ¶¶ 26, 40, and Corbett neither verbally consented nor verbally objected, 56.1 ¶ 10. In light of More's instruction to transport him to the precinct, the "in for a long night" comment, the officers' tone and body language, the continued retention of his driver's license, and the general context of being questioned about his girlfriend's death, Corbett subjectively believed at this time that he was not free to leave. Corbett Decl. ¶ 27. He chose not to verbally argue with the officers because he was emotionally distraught and was afraid that protesting would result in his being handcuffed. *Id.* ¶ 28.

Not feeling at liberty to refuse, Corbett was directed outside by an officer to a marked police car.[6] *Id.* ¶ 33; Dep. of Bryan Gillis, Ex. C to Pl.'s Opp'n to Mot. for Summ. J. (ECF No. 95-3)

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[5] To the extent this statement is offered for the truth of the matter asserted, rather than for its effect on Corbett, it is an opposing party's statement that is not hearsay under Fed. R. Evid. 801(d)(2), and is therefore admissible. In addition, More testified in a deposition that he did not recall whether he instructed an officer to take Corbett to the precinct. More Dep. 11:25-12:10. That testimony is insufficient to create a genuine factual dispute. *See, e.g.*, *Faruki v. City of New York*, No. 10-cv-9614 (LAP), 2012 WL 1085533, at *5 (S.D.N.Y. Mar. 30, 2012) ("Plaintiff's statement that she did not recall whether Defendants asked her to leave the store is insufficient to create a genuine dispute on that material issue."). While Defendants will have the opportunity to challenge the credibility of Corbett's statement at trial, the Court assumes the statement to be true and undisputed for purposes of this motion.

[6] The identity of the officer who transported Corbett to the precinct is unknown. Hereinafter, that officer is referred to as "Officer Doe." On November 30, 2015, the Court issued an order pursuant to *Valentin v. Dinkins*, 121 F.3d 72 (2d Cir. 1997), directing the City to ascertain the identities of the four "John Doe" officers named in Plaintiff's initial complaint. ECF No. 3. Although the City was able to identify three of the named officers as Sergeant More, Sergeant Gillis, and Detective Ahearne, the City was unable to identify the officer who allegedly transported Corbett to the Precinct and allegedly remained with him while he waited at the Precinct. ECF No. 19. As a result, when Corbett amended his complaint on March 29, 2016, he named only the three identified officers as defendants. ECF No. 22.

("Gillis Dep.") 15:5-10 (Oct. 3, 2016).[7] As stated in the NYPD's Unusual Occurrence Report, which was prepared by More, Corbett was "transported to the Midtown South Precinct for further questioning by Nightwatch." Englert Decl., Ex. B; *see also* 56.1 ¶ 9.

Upon arrival, Officer Doe led Corbett to the Juvenile Room at the back of the precinct. Corbett Decl. ¶ 34; 56.1 ¶ 16. Corbett was not checked in at the front desk, he did not speak to a desk sergeant, and his name was not entered into the precinct's command log. 56.1 ¶¶ 13-15. He waited inside the Juvenile Room from the time he arrived at the precinct slightly before 5:00 a.m. until 6:25 a.m., when Ahearne and Sergeant Gillis arrived to speak with him. 56.1 ¶¶ 16, 20; Corbett Dep: 63:16-17, 73:18-20; Englert Decl., Ex. D. Officer Doe stayed with him the entire time. Corbett Decl. ¶ 35. Corbett took one bathroom break, during which Officer Doe accompanied him to the bathroom, waited at the door for him to finish, and accompanied him back to the Juvenile Room.[8] *Id.* ¶ 37. Based largely on that fact, Corbett believed that Officer Doe was there to prevent him from leaving. *Id.* ¶ 36. However, Corbett was not handcuffed at any point. 56.1 ¶ 11.

At approximately 6:25 a.m., Ahearne and Gillis returned to the precinct to speak with Corbett. 56.1 ¶ 20. Once they arrived, Officer Doe left the Juvenile Room, not to be seen by Corbett again. Corbett Decl. ¶ 39. Ahearne and Gillis did not ask at that time whether Corbett had been transported to, and had waited at, the precinct voluntarily; however, they testified in

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[7] Corbett did not introduce his exhibits into the record by way of declaration, but rather attached them directly to his opposition brief. The Court will overlook that deficiency in light of Corbett's *pro se* status. *See, e.g.*, *Burke v. Royal Ins. Co.*, 39 F. Supp. 2d 251, 257 (E.D.N.Y. 1999) (addressing merits of defendant's motion for summary judgment against *pro se* plaintiff "in light of the entire record before the Court," despite plaintiff's failure to submit 56.1 statement "or to present factual material in evidentiary form"). Moreover, the Court cites the exhibits attached to Corbett's opposition only as additional evidence of propositions otherwise supported by properly authenticated evidence in the record. Therefore, the Court's choice to consider these exhibits is not material to the outcome of Defendants' motion.

[8] When asked at his deposition about Officer Doe's response to his request to use the restroom, Corbett testified: "I don't remember if [Officer Doe] immediately took me or went to check if it was allowed. Within a short period of time [Officer Doe] escorted me to the bathroom. Whether or not [Officer Doe] checked with someone else first, I think he may have." Corbett Dep. 76:3-8. In his later declaration, Plaintiff states: "[W]hen I asked to use the bathroom, [Officer Doe] first had to check if it was ok, and then escorted me to the bathroom." Corbett Decl. ¶ 37. Because Plaintiff's declaration statement contradicts his earlier deposition testimony, the Court disregards the assertion that Officer Doe checked to see if Corbett was allowed to use the restroom for purposes of resolving this motion. *See Hayes*, 84 F.3d at 619 ("[A] party may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony."). In any event, in light of the balance of the evidence in the record, that fact would not change the outcome of Defendants' motion.

depositions that they subjectively believed he was there of his own freewill. *Id.* ¶ 40; Gillis Dep. 16:6-14; Dep. of Michael Ahearne, Ex. L to Englert Decl. ("Ahearne Dep.") 19:19-25 (Oct. 3, 2016). According to their own deposition testimony, neither More, nor Ahearne, nor Gillis made a determination that there was probable cause or reasonable suspicion to support detaining Corbett involuntarily. Ahearne Dep. 17:16-18:12; Gillis Dep. 9:20-10:4; More Dep. 18:24-19:4.

Ahearne and Gillis asked Corbett to recount what had happened that morning, from the phone call with Brannon to his arrival at her apartment. 56.1 ¶¶ 20-21; Corbett Dep. 77:22-78:12. They also asked about his relationship with Brannon, her mental health history, and how they could contact her mother. 56.1 ¶¶ 21-22. Ahearne and Gillis questioned Corbett inside the Juvenile Room for 20-30 minutes, while physically blocking the only exit to the room. 56.1 ¶ 20; Corbett Decl. ¶ 41.[9] Corbett continued to believe he was free to leave the room during that time. Corbett Decl. ¶ 42.

When it appeared to Corbett that the officers had finished their questions, he asked them if he was free to leave, and the officers said he was. 56.1 ¶ 23. His driver's license, which had been taken earlier that morning, was then returned to him. Corbett Decl. ¶ 45. That was the first time since being directed into the police car outside Brannon's apartment that Corbett felt free to go. *Id.* ¶ 46.

Ahearne then interviewed Brannon's roommate and her roommate's boyfriend about the incident in another part of the precinct. 56.1 ¶¶ 24-25. At approximately 9:20 a.m., a non-party detective completed a report indicating that no signs of criminality had been found surrounding Brannon's death and that video surveillance footage had corroborated witnesses' statements. *Id.* ¶¶ 26-27.

[9] Defendants ask the Court to disregard Corbett's declaration that the officers physically blocked the exit on the ground that it is "self-serving." Reply Mem. of Law in Supp. of Mot. for Summ. J. ("Defs.' Reply") (ECF No. 97), at 4-5. For the reasons already explained, that is not a proper basis to refuse to consider otherwise competent and admissible evidence on summary judgment. *See supra* note 1. Defendants may attack Corbett's credibility at trial, but not here.

2. Procedural History

Corbett initiated this lawsuit *pro se* on November 23, 2015 against the City and four "John Doe" officers. ECF No. 1. On March 29, 2016, after a *Valentin* order from the Court and a response from the City, he amended his complaint to name Defendants More, Gillis, and Ahearne, as well as to remove the "John Doe" officer whom the City was unable to identify. ECF No. 22. Corbett amended his complaint once again with leave of the Court on October 19, 2016. ECF No. 65. In his second amended complaint, he brought claims under Section 1983 for false arrest in violation of the Fourth Amendment, *Monell* claims against the City, and various state-law claims. *Id.*

On November 2, 2016, the City moved to dismiss the *Monell* claims pleaded in the second amended complaint. ECF Nos. 69-72. The Court granted that motion on December 22, 2016. ECF No. 85. On January 10, 2017, Corbett moved pursuant to Federal Rule of Civil Procedure 41(a)(2) to voluntarily dismiss his New York Freedom of Information Law ("FOIL") claim. ECF No. 87. Corbett stated that, because "almost all of the records" he had sought through his FOIL request had been produced through discovery, his claim under FOIL had "largely been mooted," but that he wished to reserve the right to recover costs and/or fees at the conclusion of the case. *Id.* He moved pursuant to Rule 41(a)(2) rather than submitting a stipulation of dismissal because, while Defendants consented to the dismissal of the FOIL claim, they "[took] no position" on his reservation of rights. *Id.* After a telephone conference on the motion, the Court denied it on January 17, 2017. ECF Nos. 88-89.

Defendants filed the instant motion for summary judgment on January 23, 2017. ECF Nos. 90-94. Corbett filed an opposition on February 8, 2017, ECF No. 95, and Defendants filed a reply on February 14, 2017, ECF No. 97.[10]

[10] In their moving brief, Defendants erroneously asserted that all claims against the City had been dismissed in the Court's December 22, 2016 order, and that only claims against the Individual Defendants remained. As a result, Defendants failed to include the City as a party to the motion. In their reply brief, Defendants acknowledged that error and asked the Court to deem the City to be included in the motion *ab initio*. The Court grants that request.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the movant shows 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); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" (quoting former Fed. R. Civ. P. 56(c))). A genuine dispute exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," while a fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

The movant bears the initial burden of demonstrating "the absence of a genuine issue of material fact," and, if satisfied, the burden then shifts to the non-movant to present "evidence sufficient to satisfy every element of the claim." *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008) (citing *Celotex*, 477 U.S. at 323-24). To defeat a motion for summary judgment, the non-movant "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting former Fed. R. Civ. P. 56(e)). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252. Moreover, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita*, 475 U.S. at 586, and he "may not rely on conclusory allegations or unsubstantiated speculation," *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 428 (2d Cir. 2001) (internal quotation marks and citation omitted).

In determining whether there exists a genuine dispute as to a material fact, the Court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party

against whom summary judgment is sought." *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012) (internal quotation marks and citation omitted). The Court's job is not to "weigh the evidence or resolve issues of fact." *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 254 (2d Cir. 2002). "Assessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment." *Jeffreys v. City of New York*, 426 F.3d 549, 553-54 (2d Cir. 2005) (citation omitted). "[T]he judge must ask . . . not whether . . . the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id.* at 553 (quoting *Anderson*, 477 U.S. at 252).

Where, as here, a plaintiff is proceeding *pro se*, the Court "must extend extra consideration, as pro se parties are to be given special latitude on summary judgment motions." *Smith v. City of New York*, No. 14-cv-5927 (RWS), 2017 WL 2172318, at *3 (S.D.N.Y. May 16, 2017) (internal quotation marks and citation omitted); *see Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed." (internal quotation marks and citation omitted)). Accordingly, the Court will construe Corbett's submissions "to raise the strongest arguments that they suggest." *See Fulton v. Goord*, 591 F.3d 37, 43 (2d Cir. 2009) (citation omitted). "Nevertheless, proceeding pro se does not otherwise relieve a litigant from the usual requirements of summary judgment, and a pro se party's 'bald assertion,' unsupported by evidence, is not sufficient to overcome a motion for summary judgment." *Smith*, 2017 WL 2172318, at *3 (citation omitted).

III. DISCUSSION

Defendants move for summary judgment as to each of Corbett's remaining claims. First, they argue that Corbett has failed to produce evidence satisfying every element of his false arrest claim against the Individual Defendants and that, in any event, they are entitled to qualified immunity. Second, they contend that Corbett has conceded the mootness of his FOIL claim and that, regardless of mootness, the Court should decline to exercise supplemental jurisdiction over that claim. Finally, they argue that the Court should decline to exercise supplemental jurisdiction over

Corbett's remaining state-law claims. The motion is denied in its entirety.

1. False Arrest Claim

As noted, Defendants argue that they are entitled to summary judgment on Plaintiff's false arrest claim on two grounds. First, they contend that Plaintiff has failed to come forward with sufficient evidence from which a fair-minded jury could find that all the elements of false arrest have been satisfied. Second, they argue that, even if the elements of false arrest are satisfied, the record is such that the Individual Defendants are entitled to qualified immunity. The Court concludes, however, that genuine disputes of material fact exist that preclude summary judgment on both grounds.

A. Sufficiency of the Evidence

Corbett has presented evidence sufficient to withstand summary judgment on his claim for false arrest. A false arrest claim under Section 1983 resting on an individual's Fourth Amendment right to be free from unreasonable seizures, including arrest without probable cause, "is substantially the same as a claim for false arrest under New York law." *Ackerson v. City of White Plains*, 702 F.3d 15, 19 (2d Cir. 2012) (quoting *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996)). Under New York law, a plaintiff seeking to establish a cause of action for false arrest must show that: (1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged, such as by probable cause or a warrant. *Willey v. Kirkpatrick*, 801 F.3d 51, 70-71 (2d Cir. 2015) (quoting *Broughton v. State of New York*, 335 N.E.2d 310, 314 (N.Y. 1975)). "False arrest is simply an unlawful detention or confinement brought about by means of an arrest rather than in some other way and is in all respects synonymous with false imprisonment." *Covington v. City of New York*, 171 F.3d 117, 125 (2d Cir. 1999) (Glasser, J., dissenting); *see also Weyant*, 101 F.3d at 853 (describing false arrest as "a species of false imprisonment"). In the absence of a formal arrest, a seizure under the Fourth Amendment occurs where a "reasonable person would have believed that

he was not free to leave." *INS v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

Defendants do not argue that Corbett has failed to present evidence to satisfy the second or fourth elements, namely, that Corbett was conscious of the alleged confinement and that the alleged confinement was not "otherwise privileged." Although Defendants have conceded those elements, the Court also finds that there is sufficient evidence in the record to permit a jury to find that each of those elements is satisfied. Defendants focus their argument on the remaining two elements. They contend that the officer-defendants "did not intend to confine [Corbett], nor did [Corbett] indicate a lack of consent to waiting at the precinct until the detectives could speak with him." Mem. of Law in Supp. of Mot. for Summ. J. ("Defs.' Mem.") (ECF No. 94) at 4.

The first element requires some explication. Though the conventional wording of this element—"the defendant intended to confine the plaintiff"—may suggest that the subjective intent of the officers is key, it is not that simple. "To prove intent, a plaintiff must show that the defendant either: (a) confined or intended to confine plaintiff or (b) affirmatively procured or instigated the plaintiff['s] arrest." *King v. Crossland Sav. Bank*, 111 F.3d 251, 256 (2d Cir. 1997) (citing *Carrington v. City of New York*, 607 N.Y.S.2d 721, 722 (2d Dep't 1994) and *Williams v. State of New York*, 456 N.Y.S.2d 491, 493 (3d Dep't 1982)). That somewhat peculiar articulation derives from the fact that the intent element encompasses situations in which a third party directs another to confine a plaintiff or takes some action to cause a plaintiff's confinement. *See Carrington*, 201 N.Y.S.2d at 526-27 ("Because there is no claim that the deliverypersons, who the plaintiff alleges were employees of the defendant WFO, in any way restricted his ability to move, or confined him in any way, the plaintiffs must show that these defendants instigated his arrest, thereby making the police WFO's agents in accomplishing their intent to confine the plaintiff."); *see also King*, 111 F.3d at 257 (finding no evidence that American Express provided information to the police or intended that the police confine plaintiffs). Where, as here, a plaintiff alleges that the defendants themselves confined him,

the intent element simply asks whether the officers "intended to commit acts that constituted a seizure in the first instance." *Dancy v. McGinley*, 843 F.3d 93, 116 (2d Cir. 2016); *id.* ("[A]s long as an officer deliberately performed acts that constitute a seizure, the Fourth Amendment has been triggered . . . ."). In addition, a plaintiff need not prove that the officer intended to violate his rights. *Id.* at 117 (citing *Hudson v. New York City*, 271 F.3d 62, 68-69 (2d Cir. 2001)); *see also Hudson*, 271 F.3d at 68 ("[I]t is well established that specific intent is not a prerequisite to liability under § 1983" (quoting *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992))).

There is no contention here that the Individual Defendants' acts were unintentional. The first element of Corbett's false arrest claim under Section 1983 will be satisfied, then, if their volitional acts constituted a seizure within the meaning of the Fourth Amendment. That standard is an objective one. Corbett was "seized"—and the first element satisfied—if, under the circumstances, "a reasonable person would have believed that he was not free to leave." *Delgado*, 466 U.S. at 215; *see Gilles v. Repicky*, 511 F.3d 239, 245 (2d Cir. 2007) ("This is an objective inquiry that pointedly eschews consideration of intent and involves an essentially legal assessment of whether the particular circumstances would warrant the belief that a person has been detained." (internal quotation marks, alteration, and citation omitted)).

Relevant factors suggesting a police seizure include:

> the threatening presence of several officers; the display of a weapon; physical touching of the person by the officer; language or tone indicating that compliance with the officer was compulsory; prolonged retention of a person's personal effects, such as airplane tickets or identification; and a request by the officer to accompany him to the police station or a police room.

Gilles, 511 F.3d at 245 (quoting *Brown v. City of Oneonta*, 221 F.3d 329, 340 (2d Cir. 2000)). Physical blocking of exits has also been considered highly material in determining whether a seizure has occurred. *See, e.g.*, *United States v. Drayton*, 536 U.S. 194, 195 (2002) (finding encounter was not a "seizure" in part because "[t]here was . . . no blocking of exits"); *United States v. Simmons*, 560 F.3d 98, 106 (2d Cir. 2009) (holding that plaintiff was seized in part because officers stood between him

and the doorway to the building); *Dotson v. Farrugia*, No. 11-cv-1126 (PAE), 2012 WL 996997, at *12 (S.D.N.Y. Mar. 26, 2012) ("Plaintiff does not allege that defendants blocked the exit to the courthouse or prevented plaintiff from leaving the line."). Corbett has presented several pieces of evidence that could support the conclusion that he was seized. Those include: the several (at least four) officers at the scene; More's instruction to take Corbett to the precinct; the statement that Corbett was "in for a long night"; the fact that an officer directed him to a marked police car and transported him to the precinct in it; the fact that an officer stayed with him while he waited to be questioned, and even accompanied him to and from the restroom; the retention of his driver's license; and the fact that Ahearne and Gillis physically blocked the exit from the Juvenile Room. Those facts, which are supported by cognizable evidence, are more than enough to create a triable issue of fact as to whether a reasonable person would have felt free to leave under the circumstances.

For their part, Defendants argue that the following circumstances suggest Corbett was not confined: he was not handcuffed; he was not checked in at the front desk or entered into the command log; he did not speak to a desk sergeant, he waited inside the Juvenile Room; Ahearne and Gillis spoke with him only briefly; and, when Corbett asked if he could leave, he was told he could. Defs.' Mem. at 4. To the extent that Defendants argue that Corbett's false arrest claim must be dismissed because the circumstances show that he was not formally arrested, that argument has been rejected by the Second Circuit. *See Posr v. Doherty*, 944 F.2d 91, 96 (2d Cir. 1991) (holding that false arrest, for purposes of a § 1983 claim, "may be complete without either a formal arrest or a detention until the subject is arraigned"). In addition, "once the intrusion of an arrest has occurred, its definition does not depend upon what follows, such as station house booking." *Id.* at 98-99. Furthermore, although the duration of the alleged seizure may be relevant to the quantum of suspicion or evidence needed to justify it (an issue that is not at play in this case), it is not relevant to whether a seizure has occurred within the meaning of the Fourth Amendment. *See, e.g.*, *Seifert v.*

Rivera, 933 F. Supp. 2d 307, 321 (D. Conn. 2013) ("The Fourth Amendment's protection against unreasonable searches and seizures applies to all seizures of the person, including those that involve only a brief detention short of traditional arrest." (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975))). Finally, to the extent that Defendants argue that the circumstances they cite show that the Individual Defendants did not intend to effect Corbett's arrest, the Court has already explained that the pertinent test is an objective, not a subjective, one. That said, at least some of the evidence that Defendants cite—particularly the fact that Corbett was never handcuffed and that he was told he could leave when he asked—could be relevant to a jury's determination of whether Corbett was seized.

As the above shows, Corbett has brought forward sufficient evidence from which a reasonable jury could conclude that the first element of the false-arrest test is satisfied. And the evidence cited by Defendants simply serves to further illustrate that a triable issue of fact exists with respect to that element.

Corbett also has created a triable issue of fact with respect to whether he consented to the alleged confinement. As with the question whether a plaintiff was seized, "[w]hether an individual's consent to accompany law enforcement officers was voluntary or coerced is to be determined by the totality of all the circumstances." *Tarhaqa Allen v. N.Y.C. Police Dep't*, No. 07-cv-8682 (RPP), 2010 WL 1790429, at *5 (S.D.N.Y. May 5, 2010) (citing *Mendenhall*, 446 U.S. at 557). For that reason, the determination of whether a plaintiff "consented" to an alleged confinement elides at least somewhat with the determination of whether a confinement occurred at all. *See, e.g.*, *Mendenhall*, 446 U.S. at 557-58 (finding voluntary consent and no seizure where agents stopped and questioned a suspect and then asked her to accompany them to DEA office without any threats or show of force).

As noted earlier, Corbett admits that his contact with NYPD officers was initially voluntary. *See* 56.1 ¶¶ 5-6. He contends, however, that the encounter evolved into a non-consensual one when his driver's license was taken and retained; More told another officer to take him to the precinct; and

he was subsequently transported to the precinct in a police vehicle, watched over by Officer Doe, and questioned by Ahearne and Gillis with the exit blocked. "[A]n initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Delgado*, 466 U.S. at 215 (quoting *Mendenhall*, 446 U.S. at 554). Here, it is undisputed that none of the Individual Defendants ever asked if Corbett was willing to go to, or stay at, the precinct. It is similarly undisputed that Corbett neither verbally consented nor verbally objected. Thus, resolution of the issue comes down to how the parties' silence on the issue should be interpreted in light of the surrounding circumstances.

To the extent that Defendants assert they are entitled to summary judgment on Corbett's false arrest claim simply because he did not "indicate a lack of consent," *see* Defs.' Mem. at 4, that assertion is rejected. First, it simply begs the relevant question. Whether a reasonable person would feel secure in declining an officer's request and refusing consent is relevant to whether that person is "seized," *Drayton*, 536 U.S. at 202-04, and "'[c]onsent' that is the product of official intimidation or harassment is not consent at all," *Florida v. Bostick*, 501 U.S. 429, 438 (1991). *See also United States v. O'Brien*, 498 F. Supp. 2d 520, 536 (N.D.N.Y. 2007) ("[N]on-resistance is not synonymous with cooperation and is not a factor demonstrating consent.").[11] Second, the Court does not accept as a matter of first principles that a person must affirmatively state, or act out, their objection to a seizure—or ask not to be seized—in order to render that seizure unreasonable without regard to the attendant circumstances. Where, as here, there were several circumstances that could reasonably be viewed as coercive or intimidating, such a *per se* rule would be both unfair and nonsensical, forcing

[11] The Court observes that, in the context of consent to a police search, the Supreme Court has explained: "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

arrestees to affirmatively resist or protest arrest in order to preserve their constitutional rights.

With Defendants' proposed shortcut out of the way, the Court looks to the totality of the evidence in the record. For substantially the same reasons described above with respect to whether Corbett was confined, the Court concludes that Corbett has created a genuine dispute of material fact sufficient to preclude summary judgment as to whether he consented to the entirety of the February 7, 2015 encounter. *See Mendenhall*, 446 U.S. at 557-58 (finding voluntary consent based on lack of threat or show of force towards plaintiff, the brief duration of questioning, the return of plaintiff's identification before she was asked to accompany the officers, and because "[plaintiff] was not told that she had to go to the office, but was simply asked if she would accompany the officers"). In addition, a reasonable jury could find the wording of More's Unusual Occurrence Report, which states that Corbett "was transported to the Midtown South Precinct for further questioning by Nightwatch," Englert Decl., Ex. B, relevant to the determination of whether he was brought there consensually.

Because Corbett has presented evidence creating genuine disputes of material fact regarding each element of his false arrest claim, summary judgment is not appropriate.

B. Qualified Immunity

The Individual Defendants argue that, even if Corbett's false arrest claim survives summary judgment, they are entitled to qualified immunity. "Qualified immunity shields government officials from liability for civil damages as a result of their performance of discretionary functions, and serves to protect government officials from the burdens of costly, but insubstantial, lawsuits." *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995). Law enforcement officers are entitled to qualified immunity on a Section 1983 claim if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Even where the plaintiff's federal rights and the scope of the official's permissible conduct are clearly established, the qualified immunity defense protects a government actor if it was

'objectively reasonable' for him to believe that his actions were lawful at the time of the challenged act."[12] *Lennon*, 66 F.3d at 420 (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)); *see also Weyant*, 101 F.3d at 857 ("[P]ublic officials are entitled to qualified immunity if (1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights."). "The objective reasonableness test is met—and the defendant is entitled to immunity—if 'officers of reasonable competence could disagree' on the legality of the defendant's actions." *Lennon*, 66 F.3d at 420 (quoting *Malley v. Briggs*, 475 U.S. 335, 340-41 (1986)).

When "the factual record is not in serious dispute . . . [,] [t]he ultimate legal determination whether . . . a reasonable police officer should have known he acted unlawfully is a question of law better left for the court to decide." *Lennon*, 66 F.3d at 421 (quoting *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir. 1990)); *accord Harris v. O'Hare*, 770 F.3d 224, 239 (2d Cir. 2014) (same); *Estate of Jaquez v. City of New York*, 104 F. Supp. 3d 414, 434 (S.D.N.Y. 2015) (question of whether a "reasonable police officer should have known he acted unlawfully" is a question of law for the court "[e]ven though a reasonableness inquiry traditionally is a question of fact for the jury"). However, "summary judgment on qualified immunity grounds is not appropriate when there are facts in dispute that are material to a determination of reasonableness." *Husain v. Springer*, 494 F.3d 108, 133 (2d Cir. 2007) (quoting *Thomas v. Roach*, 165 F.3d 137, 143 (2d Cir. 1999)). In other words,

> [s]ummary judgment should not be granted on the basis of a qualified immunity defense premised on an assertion of objective reasonableness unless the defendant shows that no reasonable jury, viewing the evidence in the light most favorable to the Plaintiff, could conclude that the defendant's actions were objectively unreasonable in light of clearly established law.

[12] As a particular species of the objective reasonableness inquiry, an officer "is entitled to qualified immunity from a federal false arrest and imprisonment claim if he had arguable probable cause to arrest the plaintiff." *Kass v. City of New York*, -- F.3d -- , 2017 WL 3122289, at *3 (2d Cir. July 24, 2017). Defendants do not assert that basis for qualified immunity here.

O'Bert v. Vargo, 331 F.3d 29, 37 (2d Cir. 2003) (internal quotation marks omitted); *see also Lennon*, 66 F.3d at 420.

The Court cannot conclude that the Individual Defendants are entitled to qualified immunity at this stage of the litigation because facts material to that determination are in dispute. Defendants do not contend that Corbett's right to be free from an unreasonable seizure was not clearly established. And, as already explained, they do not argue that they had arguable probable cause or any other justification to detain him against his will. Instead, Defendants argue only that they are entitled to qualified immunity from Corbett's false arrest claim because competent officers could reasonably have believed he had come to the precinct and stayed there voluntarily. The record on summary judgment, when viewed in the light most favorable to Corbett, does not permit such a conclusion as a matter of law at this stage. Put differently, a reasonable jury could conclude on this record that the Individual Defendants' conduct was objectively unreasonable in light of clearly established law.

While Defendants point to a number of undisputed facts in support of their contention that their conduct was objectively reasonable—including the fact that Corbett called 911, that he approached officers when they arrived on the scene and spoke to them voluntarily, that he instructed officers on where to located Brannon's body, and that he did not verbally object to going to the precinct, Defs.' Mem. at 6—they entirely fail to address many other material facts in the record. And those facts, as presented to the Court, require credibility determinations. While Corbett's "self-serving" statements that he felt compelled to remain, that More told another officer to "take him to the precinct," that another officer said he was "in for a long night," that he was instructed to get into a marked police vehicle, that Officer Doe escorted him to and from the restroom, that his driver's license was retained throughout the encounter, and that Ahearne and Gillis blocked the only exit from the Juvenile Room are not to be disregarded on summary judgment, the self-serving nature of those statements, uncorroborated by any other evidence in the

record, does give rise to a credibility question that falls squarely in the province of the jury. The same is true of Defendants' own "self-serving" testimony that they believed Corbett went and remained voluntarily. In addition, the wording in More's Unusual Occurrence Report that Corbett "was transported to the Midtown South Precinct for further questioning" places the credibility of Defendants' testimony (as well their argument that they simply made a mistake about his consent) at least somewhat in question.

That evidence is highly material to determining whether the Individual Defendants' conduct was objectively reasonable "as measured by reference to clearly established law." *See Davis v. Scherer*, 468 U.S. 183, 191 (1984). For example, if a jury were to discount Corbett's declaration statements, all of the allegedly coercive or intimidating conduct would drop away, significantly changing the calculus with respect to whether the Individual Defendants' conduct was objectively reasonable. If, on the other hand, his testimony is fully credited, it may be difficult to conclude that officers of reasonable competence could believe their conduct was lawful.

Because, at the very least, credibility determinations are needed as to this material evidence, the Court concludes that genuine disputes of material fact preclude summary judgment for the Individual Defendants on the basis of qualified immunity. *See, e.g.*, *Berg v. Sorbo*, 604 F. App'x 8, 10 (2d Cir. 2015) (affirming district court's determination that factual dispute precluded qualified immunity from being decided on summary judgment, due in large part to "a credibility issue that cannot be determined as a matter of law"); *Cooper v. City of New Rochelle*, 925 F. Supp. 2d 588, 609 (S.D.N.Y. 2013) ("Thus, because there are genuine issues of material fact regarding what transpired upon Smith's exit from Cooper's vehicle, Defendants are not entitled to summary judgment on this claim on the ground of qualified immunity."); *see also Menlo v. Friends of Tzeiri Chabad in Israel, Inc.*, No. 11-cv-1978 (JPO), 2012 WL 137504, at *3 (S.D.N.Y. Jan. 17, 2012) (finding factual dispute precluding summary judgment where "[a] fact-finder at trial would need to weigh the credibility of Plaintiff's and [Defendant's president's] statements to decide the instant dispute of fact"); *Moore*

v. Casselberry, 584 F. Supp. 2d 580, 585 (W.D.N.Y. 2008) ("Although the evidence in the record cast[s] doubt on plaintiff's credibility, resolution of this claim remains dependent on an assessment of his and defendants' credibility, which is for the factfinder to make."); *Indelicato v. Provident Life & Accident Ins. Co.*, No. 89-cv-8436 (RJW), 1990 WL 145149, at *4 (S.D.N.Y. Sept. 28, 1990) ("In order for the disputes raised in this litigation to be resolved, extensive determinations regarding credibility . . . are required, which can only be made at trial.").

2. FOIL Claim

Defendants also ask the Court to dismiss Corbett's FOIL claim because (1) he has conceded that the claim "has largely been mooted" and (2) even if the claim is not moot, the Court should decline to exercise supplemental jurisdiction over it. Defs.' Mem. at 8. The Court cannot dismiss Corbett's FOIL claim on either of those grounds. First, Corbett has only conceded that the claim has "largely" been mooted by discovery in this matter, not that it has been mooted altogether. Because Defendants present no other evidence or argument in support of mootness here, the Court does not have an adequate evidentiary basis to conclude that Corbett's FOIL claim is moot. Second, because the Court has denied summary judgment on Corbett's federal claim, there is no basis to decline to exercise supplemental jurisdiction over his FOIL claim at this time.

Because Defendants have not moved for summary judgment on the FOIL claim on any other basis, the Court declines to address any other possible basis for its dismissal. The Court notes, however, that at least some courts have held that FOIL claims are not properly brought in federal court. *See, e.g.*, *Posr v. City of New York*, No. 10-cv-2551 (RPP), 2013 WL 2419142, at *14 (S.D.N.Y. June 4, 2013) ("This Court is without jurisdiction to consider Plaintiff's FOIL-related claims and thus Defendants request to dismiss these claims will be granted. Under New York State law, if an agency or government official fails to comply with the provisions of FOIL, the person submitting the FOIL request must pursue an administrative appeal or seek remedies in state court pursuant to N.Y. C.P.L.R. Article 78."); *Schuloff v. Fields*, 950 F. Supp. 66, 67-68 (E.D.N.Y. 1997) ("The

appropriate vehicle for challenging denials of access guaranteed by [FOIL] is a state court proceeding pursuant to N.Y.C.P.L.R. Article 78 upon exhaustion of administrative remedies."). This is not, however, an argument that Defendants have presented here.

3. The Remaining State-Law Claims

As to the remainder of Corbett's state-law claims, Defendants simply argue that the Court should decline to exercise supplemental jurisdiction "because [Corbett's] federal claims fail as a matter of law." Defs.' Mem. at 9. Because the Court has not dismissed the federal claims at this time, there is no basis to decline supplemental jurisdiction over any of the state-law claims.

IV. CONCLUSION

For the reasons described above, Defendants' motion for summary judgment is DENIED. The Clerk of Court is directed to terminate the motion pending at ECF No. 90. The Clerk of Court is further directed to amend the caption of this case to correct the spelling of Defendant Michael Ahearne.

SO ORDERED.

Dated: July 27, 2017
New York, New York

GREGORY H. WOODS
United States District Judge