At an I.A.S. Part 52 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 80 Centre Street, Borough of New York, City and State of New York, on the 16th day of AUGUST 2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

JOHN BURTS,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Defendant(s)

MOTION SEQ. NO.2

INDEX NO.:
159321/2013

The following papers numbered 40 to 69 read on this motion	NYSCEF Doc. Nos.
Notice of Motion, Affirmation & Exhibits	40–58
Affirmation in Opposition & Exhibit	60–61
Reply Affirmation & Exhibits	67–69

ALEXANDER M. TISCH, J.:

Upon the foregoing papers, defendants The City of New York (City), New York City Police Department (NYPD), and PO Joel Crooms, SHIELD #17984 (Crooms) (collectively, defendants) move this Court for an order dismissing the complaint insofar as asserted against them pursuant to CPLR 3211(a)(7) and 3212.

BACKGROUND

On or about October 9, 2013, plaintiff commenced this action seeking to recover damages arising out of his arrest, which occurred on January 21, 2013 in the 135th Street/Lenox Avenue 2/3 subway station in the County, City and State of New York. Plaintiff's complaint asserts assault, battery, and excessive force claims, among others discussed *infra*.

In support of the motion defendants submitted, inter alia, plaintiff's GML § 50-h hearing and examination before trial (EBT) testimony transcripts (NYSCEF Doc. Nos. 44, 49), the EBT testimony transcripts of Crooms and Lieutenant Courtney Adams (Adams) (NYSCEF Doc. Nos.

50, 52), and an audio recording of plaintiff's interview with officers from the Internal Affairs Bureau (IAB) conducted a couple of hours after the arrest, with an accompanying transcript of the interview (NYSCEF Doc. Nos. 53, 54).

Plaintiff's GML § 50-h hearing and examination before trial (EBT)

Plaintiff testified that on the date of the incident, he was standing on the uptown subway platform, "playing basketball" with a piece of paper and the garbage can. He threw the piece of paper toward the garbage can, missed, and it landed on the platform. An officer approached plaintiff, asked for his ID, and plaintiff gave it to him. Another officer approached them, and that officer ran plaintiff's ID. Plaintiff was then told to put his hands up on the wall. Plaintiff was repeatedly asking if he was being arrested and/or why he was being arrested, and was repeatedly told by an officer to put his hands against the wall and/or he was repeatedly told to put his hands behind his back.[1] Plaintiff "threw his hands up," turned around to face the officers, and put his hands down. Plaintiff admitted that this behavior could be perceived as a threat to the officers. After he turned around, one of the officers hit plaintiff in the left leg with his baton, causing plaintiff to fall to the ground. Plaintiff got up and the officer allegedly struck him with the baton again. He claims he was in too much pain to walk, and the officers dragged him approximately 30 feet toward the other side of the turnstiles, at which time the officers attempted to handcuff him. Plaintiff admittedly struggled when officers attempted to handcuff him. He also claims that one officer put his foot on plaintiff's head and the other officer was trying to secure handcuffs on plaintiff's hands. It is unclear from the testimony when, but at some point during the encounter, an officer also struck both of plaintiff's hands. The officers took plaintiff upstairs and out of the subway station, and they hit his head against

[1] There are a couple of inconsistencies between his § 50-h hearing and EBT testimonies, and certain gaps or extra information in one and not in the other. However, this Court construes the two testimonies together and will highlight the differences to the extent necessary.

glass and/or the door of the police van. He was placed in a police van and during the ride to the police station, he complained that he was in pain, that his wrists and knee were hurting, and needed to go to a hospital. When he got to the precinct, a captain asked plaintiff if he needed an ambulance, and plaintiff was taken by ambulance to Harlem Hospital.

EBT of Defendant Crooms & Lieutenant Courtney Adams

On the date of the incident, Crooms and Adams (the officers) were assigned to patrol the vicinity of the 135th Street/Lenox Avenue 2/3 subway station. The officers observed plaintiff standing on the uptown platform, littering, by throwing pieces of paper onto the subway track and on the platform. They approached plaintiff, identified themselves as officers, and asked plaintiff for identification, to which plaintiff complied. Crooms told plaintiff he was stopped for littering. Crooms conducted a warrant check via radio, and received a response of "10-18," which means that the officers "must arrest" the plaintiff.

Crooms asked plaintiff to turn around, to which he complied, so that plaintiff's back was facing Crooms. Crooms put plaintiff's ID in his pocket, then plaintiff allegedly stated "I am not going back for this," turned around towards the officers and attempted to flee by running toward the subway exit. Plaintiff grabbed the bars of a gate between the emergency exit door and turnstiles with his right hand and refused to let go.

Crooms first tried to use his hands to pry plaintiff's fingers off the gate, but plaintiff continued to hold on. He then took out his expandable baton, also known as an "asp," and told plaintiff that if he did not let go of the gate, Crooms would use the baton. Crooms struck plaintiff's right hand with the baton, and plaintiff let go of the gate. Officers were able to put one handcuff over plaintiff's right wrist. Plaintiff continued to attempt to flee and tumbled through the emergency exit onto the ground. The officers attempted to handcuff plaintiff while he was on the ground, but

plaintiff refused to give officers his left arm and actively resisted arrest. The officers were eventually able to handcuff plaintiff by connecting two sets of cuffs behind his back. Officers took plaintiff to the precinct and asked if he required medical attention, and plaintiff requested medical attention. Plaintiff was then transported by ambulance to Harlem Hospital.

Plaintiff's IAB Interview

Plaintiff's statement describes the incident similarly to Crooms. He was waiting on the uptown platform and he threw a piece of candy on the subway tracks. An officer approached him and asked what he was doing, and plaintiff admitted that he threw a piece of melted candy onto the subway tracks. The officer asked plaintiff for his ID, the officer ran plaintiff's ID, and told the plaintiff to put his hands behind his back because he was under arrest.

Plaintiff told the IAB officers that he believed he had an open warrant, so he ran from Crooms. He fled to the exit, officers told plaintiff to stop, but plaintiff did not stop. The officers caught up to plaintiff and grabbed him, so plaintiff grabbed onto a mental stanchion near the exit gate. The officers asked plaintiff to let go of the stanchion three times, then one of the officers took out his baton and struck plaintiff in the leg three times, causing plaintiff to fall to the ground. While on the ground, plaintiff admits that he physically resisted arrest by stiffening his arms and trying to prevent his arms from going behind his back. Plaintiff stated that an officer then struck him two times on his right wrist with the baton. The officers got one handcuff on and then eventually got the other handcuff on him after about 15–20 seconds of struggling, so he was double handcuffed. They did not strike plaintiff after he was in handcuffs.

After plaintiff was handcuffed, he told officers that his arm and leg hurt. He was able to walk out of the subway station. The officers called an ambulance and he was transported to Harlem Hospital, where he was diagnosed with a wrist sprain and fractured leg. He told the IAB officers

that there was an open, active warrant for his arrest at the time he was initially stopped by the officers for driving with a suspended license.

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The "evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (Valentin v Parisio, 119 AD3d 854, 855 [2d Dept 2014]).

"In considering a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist" (Rivers v Birnbaum, 102 AD3d 26, 42 [2d Dept 2012]; see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]), and the motion "should not be granted where there are facts in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (Ferguson v Shu Ham Lam, 59 AD3d 388, 389 [2d Dept 2009]).

Admissibility of the IAB Interview

Initially, plaintiff claims that the IAB interview is in inadmissible form and should not be considered as evidence in support of defendants' motion. Plaintiff further claims that it could only be used for impeachment purposes at trial. In reply, defendants submit the affidavit of Detective Dennis, who was one of the IAB interviewers and argues that the recording is admissible.

"The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (Dannasch v Bifulco, 184 AD2d 415, 417 [1st Dept 1992]). "This rule,

however, is not inflexible, and a court, in the exercise of its discretion, may consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented claim or evidence" (Kennelly v Mobius Realty Holdings LLC, 33 AD3d 380, 381–82 [1st Dept 2006]). The Court will consider Detective Dennis' affidavit as it was submitted to merely correct a technical deficiency in defendants' moving papers, and does not assert new claims, arguments, or evidence (see Matapos Tech. Ltd. v Compania Andina de Comercio Ltda, 68 AD3d 672, 672 [1st Dept 2009]; see, e.g., Hersh v One Fifth Ave. Apt. Corp., 2016 NY Slip Op 30835[U], *13–14 [Sup Ct New York County 2016]). Rather, it was submitted in direct response to plaintiff's argument concerning the recording's inadmissibility (see Ryan Mgt. Corp. v Cataffo, 262 AD2d 628, 630 [2d Dept 1999]).

"Admissibility of tape-recorded conversation requires proof of the accuracy or authenticity of the tape by 'clear and convincing evidence' establishing 'that the offered evidence is genuine and that there has been no tampering with it'" (People v Ely, 68 NY2d 520, 527 [1986], quoting People v McGee, 49 NY2d 48, 59 [1979]). Here, by submitting an affidavit from Detective Dennis, a participant to the conversation, the audio recording was properly authenticated (see People v Ely, 68 NY2d at 527; Lipton v New York City Tr. Auth., 11 AD3d 201 [1st Dept 2004]; see also Muhlhahn v Goldman, 93 AD3d 418 [2d Dept 2012]).

However, authentication is not enough and, in order for it to be considered as admissible evidence, it should be nonhearsay or fall under a hearsay exception (see, e.g., People v Pooler, 98 AD3d 751 [2d Dept 2012] [complainant's 911 call "was properly admitted into evidence under the present sense impression exception to the hearsay rule" and "was properly authenticated" through the complainant's testimony]).

Here, the Court finds that the IAB interview would likely be admissible (see Nappi v Falcon Truck Renting Corp., 286 AD 123, 126 [1st Dept 1955] ["It is well-settled law that in a civil action the admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever or to whomsoever made"], affd 1 NY2d 750 [1956]; Lynch v Ford, 60 AD2d 880, 881 [2d Dept 1978] ["[I]t is well settled that the prior inconsistent statements of a party are admissible for the purpose of impeaching his credibility."]). However, determining the nature of the statements and its proper purpose is best left for the trial judge (see id. ["Evidence may be incompetent for one purpose but entirely proper and admissible for another"]). As demonstrated below, a determination on its admissibility as direct evidence is not required in order to properly dispose of this motion.

Excessive Force[2]

"Claims that law enforcement personnel used excessive force in the course of an arrest are analyzed under the Fourth Amendment and its standard of objective reasonableness" (Combs v City of New York, 130 AD3d 862, 864 [2d Dept 2015] [internal quotation marks and citations omitted]; see also Shamir v City of New York, 804 F3d 553, 556 [2d Cir 2015] ["the use of excessive force renders a seizure of the person unreasonable and for that reason violates the Fourth Amendment"]). This reasonableness test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight" (Graham v Connor, 490 US 386, 396 [1989]). "The reasonableness of an officer's use of force must be 'judged from the perspective of a reasonable officer on the scene, rather than

[2] "To the extent plaintiff asserts claims of assault . . . under 42 USC § 1983, these claims are best understood as a federal claim of excessive force" (Murray v City of New York, 154 AD3d 591, 592 [1st Dept 2017]).

with the 20/20 vision of hindsight'" (Rivera v City of New York, 40 AD3d 334, 341–42 [1st Dept 2007], quoting Graham, 490 US at 396).

Here, it is evident that there is a clear issue of fact with respect to the circumstances of the incident according to the plaintiff's § 50-h hearing and EBT testimony versus the officers' EBT testimony. The officers' testimony clearly indicates that the amount of force used was reasonable to effectuate the arrest, particularly in light of the testimony that plaintiff attempted to flee and run out of the subway station when he found out he was going to be arrested. In each time that Crooms used force via his baton, it was due to either plaintiff's refusal to follow officers' commands and/or because he was actively, physically resisting arrest by failing to remove his hands from the turnstile gate and put his hands behind his back to be handcuffed.

Plaintiff's testimony, on the other hand, indicates that it is questionable whether the officers used a reasonable amount of force. He testified that he admits to putting his hands up, turning around, and putting his hands down, which could be perceived as a threat to the officers, and perhaps justifying the use of force at that point. However, he also testified that after he fell to the ground, and got back up, he was struck again in the knees and could not walk thereafter; he also testified that he was dragged for 30 feet, at which point the officers tried to handcuff him. This may be considered as excessive in light of his other testimony that he was not littering, but "playing basketball" with a piece of paper, and he denied fleeing the officers.

The inconsistency elicit in the evidence creates an issue of fact, which requires the denial of the motion (see Mazzio v Highland Homeowners Assn. & Condos, 63 AD3d 1015, 1016 [2d Dept 2009] ["In view of this conflicting evidence, [the parties contradictory deposition testimonies], the defendants failed to sustain their burden of demonstrating the absence of any material issue of fact"]).

Even if the Court considered the IAB interview, it would only appear to corroborate the officers' version of the incident but does not eliminate the issue of fact raised by plaintiff's § 50-h hearing and EBT testimony. While the Court agrees with defendants' contention that "[p]laintiff should not be permitted to artificially create issues of fact by providing inconsistent accounts of this incident," this Court is bound to consider the evidence in the light most favorable to the plaintiff (see Valentin, 119 AD3d at 855; Rivera, 40 AD3d at 342). Additionally, the Court's function upon a motion for summary judgment is issue finding, and not issue determination; nor is it entitled to make findings on credibility (see Rivers, 102 AD3d at 42).

Accordingly, the defendants failed to meet their initial prima facie burden on this issue. "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" on this issue (Alvarez, 68 NY2d at 324)

Remaining Claims

The Court notes that the following branches of the motion are granted as unopposed: dismissal of the complaint against the NYPD as a non-suable entity (see New York City Charter, § 396; see, e.g., Funt v Human Resources Admin. of the City of N.Y., 68 AD3d 490 [1st Dept 2009]); dismissal of plaintiff's causes of action for negligent assault and/or negligent battery (see Babikian v Nikki Midtown, LLC, 60 AD3d 470, 471 [1st Dept 2009]); and negligent infliction of emotional distress (see Dillon v City of New York, 261 AD2d 34, 41 [1st Dept 1999]).

While plaintiff concedes that his state law claim for negligent hiring training and retention should be dismissed (see Karoon v New York City Tr. Auth., 241 AD2d 323, 324 [1st Dept 1997]), he opposes that branch of the motion to dismiss the related claim under 42 USC § 1983. However, the Court finds that the complaint fails to sufficiently state a *Monell* claim. A general, boiler plate statement regarding an unidentified policy, practice or custom does not sufficiently assert a cause

of action against a municipality for deficiencies in hiring, training or supervising its officers (see Ashcroft v Iqbal, 556 US 662 [2009]; Monell v Department of Social Services of City of New York, 436 US 658 [1978]).

In conclusion, it is hereby ORDERED that the defendants' motion is granted to the extent that the complaint is dismissed insofar as asserted against the NYPD; and it is further

ORDERED that the motion is denied as to plaintiff's state and federal excessive force claims against the City and Crooms; and it is further

ORDERED that the complaint is otherwise dismissed insofar as asserted against the City and Crooms.

This shall constitute the decision and order of the Court.

ENTER,

HON. ALEXANDER M. TISCH
A.J.S.C.

HON. ALEXANDER M. TISCH