UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of April, two thousand and eighteen.

Before: Debra Ann Livingston,
Denny Chin,
Christopher F. Droney,
Circuit Judges.

Master Baye Balah Allah,

Plaintiff - Appellant,

B.Z.B.S., (Minor), Princess Doxen,

Plaintiff,

v.

Brian Wilson, #27486, Jason Wursup, #3547, Dexter Russell, #447, Sergeant Farid Aliyev, NYPD, #00140, Cedric Brown, #0000,

Defendants - Appellees,

ORDER

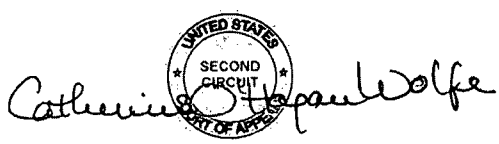
Docket No. 17-2727

Appellant, pro se, moves to recall the mandate.

IT IS HEREBY ORDERED that the motion is DENIED.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court



MANDATE

S.D.N.Y.-N.Y.C.
13-cv-4269
Torres, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of January, two thousand eighteen.

Present:

Debra Ann Livingston,
Denny Chin,
Christopher F. Droney,
Circuit Judges.

Master Baye Balah Allah,

Plaintiff-Appellant,

B.Z.B.S., (Minor), Princess Doxen,

Plaintiff,

v. 17-2727

Brian Wilson, #27486, et al.,

Defendants-Appellees,

Unidentified Department of Homeless Services Officer,

Defendant.

Appellant, pro se, moves for leave to proceed in forma pauperis. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

MANDATE ISSUED ON 1/23/2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MASTER BAYE BALAH ALLAH,
Plaintiff,

-against-

BRIAN WILSON #27486, JASON WARSOP #3547, DEXTER RUSSELL #447, SGT. FARID ALIYEV #00140, CEDRICK BROWN #0000
Defendants.

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13 **CIVIL** 4269 (AT)(RLE)

JUDGMENT

Defendants having moved for summary judgment, and the matter having come before the Honorable Analisa Torres, United States District Judge, and the Court, on July 31, 2017, having rendered its Order granting Defendants' motion for summary judgment and directing the Clerk of Court to close this case. Pursuant to 28 U.S.C. § 1915(a)(3), the Court certifies that any appeal from the order would not be taken in good faith and, therefore, denying in forma pauperis status for the purpose of any appeal. See Coppedge v. United States, 369 U.S. 438, 444-45 (1962), it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated July 31, 2017, Defendants' motion for summary judgment is granted. Pursuant to 28 U.S.C. § 1915(a)(3), the Court certifies that any appeal from the order would not be taken in good faith and, therefore, in forma pauperis status is denied for the purpose of any appeal; accordingly, the case is closed.

Dated: New York, New York
July 31, 2017

RUBY J. KRAJICK

Clerk of Court

BY: K Mango

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MASTER BAYE BALAH ALLAH,

Plaintiff,

-against-

BRAIN WILSON #27486, JASON WARSOP #3547, DEXTER RUSSELL #447, SGT. FARID ALIYEV #00140, CEDRICK BROWN #0000

Defendants.

13 Civ. 4269 (AT) (RLE)

ORDER

ANALISA TORRES, District Judge:

Plaintiff *pro se*, Master Baye Balah Allah, brings this action under 42 U.S.C. § 1983 against New York City Police Department ("NYPD") Officers Brian Wilson, Jason Warsop, and Farid Aliyev, and Department of Homeless Service ("DHS") Officers Dexter Russell and Cedrick Brown, alleging that they falsely arrested and used excessive force against Plaintiff on August 4, 2012. After three years of fact discovery, Defendants move for summary judgment. ECF No. 149. For the reasons stated below, Defendants' motion is GRANTED.

BACKGROUND[1]

On August 4, 2012, at approximately 1:00 a.m., police observed Allah and a young boy in a subway car that was stopped at the Brooklyn Bridge City Hall station. Def. L.R. 56.1 ("Def. 56.1") ¶ 1, ECF No. 152. The boy was Plaintiff's five-year-old grandson, B.Z.B.S. *Id.* According to Defendants, the train's conductor had notified police that Allah had been riding the train back and forth all night with a child, and that the child was crying and asking for his mother. *Id.* ¶ 2; Warsop Decl. ¶¶ 8-9, 21, ECF No. 150-1.

When Officers Brian Wilson and Jason Warsop entered the train, they observed Allah

[1] The following facts, which are taken from the parties' Rule 56.1 statements and accompanying affidavits and exhibits, are undisputed unless otherwise indicated.

sleeping and outstretched on multiple seats. Def. 56.1 ¶ 5; Allah Dep. 157:19-20, ECF No. 165-1.[2] Warsop observed B.Z.B.S. looking sad and confused. Def. 56.1 ¶ 6. Plaintiff denies that B.Z.B.S. was in distress. Pl. L.R. 56.1 Stmt ("Pl. 56.1") ¶ 5, ECF No. 165. Warsop ordered Allah to step out onto the platform so that he could question him. *Id.* ¶ 6; Def. 56.1 ¶ 7. The officers told Allah that they were investigating a possible kidnapping based on reports of Plaintiff riding the train back and forth all night with a child who appeared to be in distress. Pl. 56.1 ¶ 6; Def. 56.1 ¶¶ 8-10. The officers asked Allah for identification, and he complied. *Id.* ¶ 9. Police then separated B.Z.B.S. from Plaintiff in order to question B.Z.B.S. separately. *Id.* ¶ 10; Def 56.1 ¶ 12. DHS officers Russell and Brown then appeared on the scene. Def. 56.1 ¶ 16. According to Plaintiff, when he attempted to walk to the staircase where B.Z.B.S. was being questioned, police placed him under arrest for disorderly conduct and resisting arrest.[3] Pl. 56.1 ¶¶ 15-16; Def. 56.1 ¶ 17. At the time of Plaintiff's arrest, police had issued an "I-Card" naming him as a suspect in a case of forcible touching. Def. 56.1 ¶ 19.

Although the parties agree on the broad outlines of what occurred before Allah's arrest, they disagree as to the amount of force used to arrest Allah. Plaintiff testified that in the course of his arrest, and after he was handcuffed, Defendants beat him, punching him "in the face and the chest." Allah Dep. 110:22-25. Plaintiff also stated that he "was picked up by Warsop, Wilson, Russell, Brown and other unknown officers, [who] started hitting [Plaintiff] in his face

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[2] Plaintiff denies that he was sleeping in the train, but admits that he "was found guilty of sleeping on the train charge at trial." Pl. 56.1 ¶ 17. Accordingly, he is collaterally estopped from relitigating this issue, which was determined adversely to him in a criminal proceeding. *See Crum & Forster Ins. Co. v. Goodmark Indus., Inc.*, 488 F. Supp. 2d 241, 244 (E.D.N.Y. 2007) (citing *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 43 (2d Cir. 1986)).

[3] Defendants dispute this characterization. Def. 56.1 ¶¶ 31-39. They state that Plaintiff quickly moved toward B.Z.B.S., picked him up, and attempted to leave the station with him, and that police told Plaintiff he was not free to leave before placing him under arrest. *Id.*

and body as they carried him out of the station and took him to [the precinct]."[4] Pl. 56.1 ¶ 19. No ambulance was called, and police transported Allah to the Transit District 2 Precinct, where he was held overnight. Allah Dep. 118:1-19, 120:21-121:8; Warsop Decl. ¶ 47. Allah spent six hours in custody, and there is no record of his seeking immediate medical attention upon his release. Allah Dep. 126:11-16.

Plaintiff claims that as a result of the beating he suffered many injuries, including bruises, lacerations, right knee pain, arm and wrist injuries, loss of consciousness, and the worsening of existing medical problems such as tension headaches and hip pain. Allah Dep. 116:1-6, 154:4-21. Six days after his arrest, on August 10, 2012, Plaintiff sought medical treatment for his foot at the Family Health Center of Harlem. Medical Rs. at 5, ECF No. 150-5. Plaintiff had a follow-up appointment on August 20, 2012. *Id.* at 2. The medical records from those appointments do not show that Plaintiff complained of injuries stemming from an arrest. *Id.* at 2-7. Six days after the incident, Plaintiff told doctors that he was not in pain. *Id.* at 6. Allah does not dispute the authenticity or accuracy of the medical records and cites them in support of his claims. *See* Pl. Mem. 2, ECF No. 165.

On March 17, 2015, in the New York City Criminal Court, Plaintiff was convicted of one of the charges for which he was arrested, violating transit code 1050.7(j), which prohibits disorderly conduct in the subway. N.Y. Comp. Codes R. & Regs. tit. 21, § 1050.7(j) (2017); Certificate of Disposition, ECF No. 150-4. Allah was sentenced to time served. *Id.*

[4] Defendants dispute Plaintiff's testimony, swearing that no officer ever "slammed, punched, kicked, [or] choked" him. Warsop Decl. ¶¶ 50-53. Defendants explain that "[t]he only physical contact that either [Officer Warsop], Police Officer Wilson, Officer Russell, or Officer Brown had was in attempting to handcuff Master Baye Balah Allah." *Id.* ¶ 54.

DISCUSSION

I. Standard of Review

Summary judgment is appropriate when the record shows that "there is no genuine dispute as to any material fact and the moving party 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). A genuine dispute 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). Material facts are those which, under the governing law, may "affect the outcome of a case." *Id.*

In ruling on a summary judgment motion, all evidence must be viewed "in the light most favorable to the non-moving party," *Overton v. N.Y. State Div. of Military & Naval Affairs*, 373 F.3d 83, 89 (2d Cir. 2004), and the court must "resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought," *Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc.*, 391 F.3d 77, 83 (2d Cir. 2004).

"While it is undoubtedly the duty of district courts not to weigh the credibility of the parties at the summary judgment stage, in the rare circumstance where the plaintiff relies almost exclusively on his own testimony, much of which is contradictory and incomplete, it will be impossible for a district court to determine whether 'the jury could reasonably find for the plaintiff,' and thus whether there are any 'genuine' issues of material fact, without making some assessment of the plaintiff's account." *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005) (citation omitted) (quoting *Anderson*, 477 U.S. at 252). Furthermore, "[m]ere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist." *Kennedy v. Arias*, No. 12 Civ. 4166, 2017 WL 2895901, at *7 (S.D.N.Y. July 5, 2017) (quoting *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010)).

A court will "liberally construe pleadings and briefs submitted by *pro se* litigants, reading such submissions 'to raise the strongest arguments they suggest.'" *Bertin v. United States*, 478 F.3d 489, 491 (2d Cir. 2007) (citation omitted) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)). But a *pro se* party's "'bald assertions, unsupported by evidence,' will not overcome a motion for summary judgment." *Kennedy*, 2017 WL 2895901, at *7 (quoting *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991)) (alterations omitted).

II. False Arrest

Defendants argue that Allah's false arrest claim is barred as a matter of law because he was ultimately convicted of the crime for which he was arrested. Def. Mem. 5, ECF No. 151. The Court agrees.

"[W]here a civil rights plaintiff has been convicted of the offense for which he was arrested, that conviction is conclusive evidence that probable cause existed for an arrest and is a 'complete defense' to a false arrest claim." *John v. Lewis*, No. 15 Civ. 5346, 2017 WL 1208428, at *10 (E.D.N.Y. Mar. 31, 2017) (quoting *Cameron v. Fogarty*, 806 F.2d 380, 387 (2d Cir. 1986)); *see also Jean-Laurent v. Cornelius*, No. 15 Civ. 2217, 2017 WL 933100, at *3-4 (S.D.N.Y. Mar. 8, 2017) ("[A] conviction for the offense which precipitated the arrest is definitive evidence of probable cause," which is a complete defense to an action for false arrest. (citation omitted)).

There is no genuine dispute of fact that Allah was tried and found guilty of disorderly conduct. *See* Certificate of Disposition. There is no evidence in the record that this conviction has been reversed on appeal or otherwise invalidated.

Accordingly, summary judgment is GRANTED as to Plaintiff's false arrest claim.

III. Excessive Force

Defendants argue that the excessive force claim should be dismissed because no reasonable jury could find in favor of Plaintiff. Def. Mem. 8-9. The Court agrees.

Plaintiff's claim of excessive force "is reviewed under an 'objectively reasonable' standard." *Jenkins v. Town of Greenburgh*, No. 13 Civ. 884, 2016 WL 205466, at *4 (S.D.N.Y. Jan. 14, 2016) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). The Court asks "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* (quoting *Graham*, 490 U.S. at 397). "[T]he right to make an arrest or investigatory stop," moreover, "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396.

This case presents the rare circumstance where "an assessment of the plaintiff's account" is warranted because Allah's testimony is "so replete with inconsistencies and improbabilities," *Jeffreys*, 426 F.3d at 554, 555, and is directly contradicted by the medical evidence, *Davis v. Klein*, No. 11 Civ. 4868, 2013 WL 5780475, at *4 (E.D.N.Y. Oct. 25, 2013). Most glaring is the absence of record evidence to support Plaintiff's testimony that Defendants punched and beat him, Allah Dep. 109:3-7; that he was "in pain for almost two to three weeks," *id.* 116:1-2; or that he suffered bruises, lacerations, knee or hip pain, arm and wrist injuries, headaches, or losses of consciousness as a result of his arrest, *id.* 154:17-155:7. Absent any supporting evidence, Allah's inconsistent and self-serving testimony is thus insufficient to defeat Defendants' motion for summary judgment. *See Jenkins*, 2016 WL 205466, at *4 (A nonmoving party's "self-serving statement, without direct or circumstantial evidence to support the charge, is insufficient to defeat a motion for summary judgment." (quoting *Fincher v. Depository Trust & Clearing*

Corp., No. 06 Civ. 9959, 2008 WL 4308126, at *3 (S.D.N.Y. Sept. 17, 2008) *aff'd*, 604 F.3d 712 (2d Cir. 2010)).

After being released from custody six hours after his arrest, and despite suffering a beating by five or more officers, Allah did not seek any immediate medical care. Allah Dep. 126:11-16, 108:2-6, 102:22-104:1, 114:21-115:5. Instead, Plaintiff waited six days before seeking medical care, and even then it was not for injuries stemming from his arrest but for a foot exam. Medical Rs. at 5. Clinic staff believed Plaintiff might have been suffering from a foot fungus and sent a culture for testing. *Id.* at 6. The medical records from that visit do not include any reports of lacerations, bruises, or any injuries associated with the arrest. *Id.* at 5-8. As part of their evaluation, the medical staff recorded on August 10, 2012 that "Patient has no pain today." *Id.* at 6; *contra* Allah Dep. 116:1-2 ("I was in pain for almost two or three weeks [after the arrest]."). Ten days later, on August 20, 2012, Plaintiff returned to the medical clinic, and the records from that follow-up appointment likewise reflect no injuries from the arrest. Medical Rs. at 1-4. In fact, the records from that second visit state: "Patient denies pain," and "patient appears well, in no apparent distress." *Id.* at 2-3, 6. The contemporaneous medical records thus directly contradict Plaintiff's after-the-fact testimony that as a result of excessive force used by the police during his arrest he suffered various injuries, and that he was in pain for weeks thereafter.[5]

When asked about his injuries at this deposition, Allah was evasive and could not recall from memory any details about injuries to his face, despite the fact that he testified he was

[5] Plaintiff argues that his contemporaneous medical records show that he reported he was suffering from tension headaches to medical staff in connection with the arrest. *See* Pl. Mem. 2. But the reference to tension headaches he cites is dated July 23, 2010, more than two years before the arrest at issue. *See* Medical R. at 1.

repeatedly punched in the face by Defendants.

> Q. I'm just asking from memory, from your memory if you can tell me what injuries you sustained to your face.
> A. And repeat, I would have to look at my medical history to refresh my memory to see that.
> Q. Okay, so you have no memory of that at this moment?
> A. That's your words. That's your words. That's not my words.
> Q. Okay. Let me ask this - -
> A. My words - - my exact words are, I have to look into my medical history to see.
> Q. Do you have a memory of that at this moment?
> A. I'd have to look into my medical history to see.

Allah Dep. 158:12-159:14. As discussed above, Plaintiff's medical records do not reflect that Plaintiff reported, or clinic staff diagnosed, any facial injury in the days and weeks after the arrest.

Summary judgment is appropriate where the "undisputed medical records directly and irrefutably contradict . . . plaintiff's description of his injuries." *Davis*, 2013 WL 5780475, at *4. In *Davis*, the *pro se* plaintiff complained that police "had repeatedly punched plaintiff during the arrest and booking process," but his medical records did not reflect any resulting injuries. *Id.* The court concluded that "it is simply not believable that the hospital records would indicate that Davis had 'no skin abrasions'" if plaintiff were repeatedly punched. *Id.* As a result, the court granted summary judgment in defendants' favor.

Other courts in this district similarly have granted summary judgment when no reasonable jury could credit plaintiff's account of excessive force. *See, e.g.*, *Bove v. City of New York*, No. 98 Civ. 8080, 1999 WL 595620, at *6 (S.D.N.Y. 1999) (granting summary judgment where there were "no affidavits from the plaintiff's treating physicians or psychologists, no hospital records—in short, nothing to substantiate . . . the alleged beating by the NYPD other than plaintiff's bald and conclusory allegations."); *Jimenez v. City of New York*, No. 14 Civ.

2994, 2015 WL 5638041, at *6 (S.D.N.Y. Sept. 24, 2015) ("[A]s in *Jeffreys*, a witness is testifying to a version of events that is contrary to that presented by all other witnesses. Here, as there, an array of contemporaneous statements and documents make the testimony of Mrs. Jimenez plainly incredible.").

Like in those cases, Plaintiff's conclusory allegations are completely at odds with the record evidence. Plaintiff here swears that he was punched repeatedly by more than five officers, suffered lacerations and bruises, and that he experienced pain for two to three weeks, Allah Dep. 116:1-6, 154:4-21, but his medical records note that Plaintiff reported no pain and that "patient appear[ed] well, in no apparent distress." Medical Rs. at 2-3, 6. Allah offers no explanation for the contradiction.

Further straining Plaintiff's account is that, three months after his deposition, he submitted eighteen pages of purported corrections to the deposition transcript. Allah Affirm., Ex. A, ECF No. 165. Notwithstanding the fact that the court reporter certified the deposition transcript as a true record of Plaintiff's testimony, Allah Dep. 172, Allah significantly rewrote portions of his deposition testimony and offered more than one hundred blanket denials, repeatedly writing "Didn't make that statement" in reference to portions of his deposition. These corrections cannot be used to create a genuine dispute of fact. *See Kennedy v. City of New York*, 570 F. App'x 83, 84 (2d Cir. 2014) (summ. order) ("If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." (quoting *Hayes v. N.Y.C. Dep't of Corr.*, 84 F.3d 614, 619 (2d Cir. 1996)).

Given the dearth of evidence supporting Plaintiff's claims, and the fact that Plaintiff's

testimony is inconsistent and contradicted by undisputed medical records, no reasonable jury would be able to find for Plaintiff. Accordingly, Defendants' motion for summary judgment is GRANTED as to Plaintiff's claim of excessive force.

CONCLUSION

For the reasons stated above, Defendants' motion for summary judgment is GRANTED.

The Clerk of Court is directed to terminate motion at ECF No. 149 and to close this case. The Clerk of Court is further directed to mail a copy of this order and all unpublished decisions cited therein to Plaintiff *pro se*.

Pursuant to 28 U.S.C. § 1915(a)(3), the Court certifies that any appeal from this order would not be taken in good faith and, therefore, *in forma pauperis* status is denied for the purpose of any appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: July 31, 2017
New York, New York

ANALISA TORRES
United States District Judge

Additional material from this filing is available in the Clerk's Office.