

No.

In The
Supreme Court of the United States

ZIMING SHEN,
Petitioner,

v.

POLICE OFFICER EVAN ARONOWITZ, and
POLICE OFFICER MICHAEL MRAZ,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether, on a summary judgment motion and as a matter of law, a court may conclude that police officers did not use excessive force in violation of 42 U.S.C. §1983 when they rear-handcuffed a visibly injured, cooperating and non-threatening and non-violent suspect knowing they were causing him to experience significant pain but did not necessarily cause the suspect additional injury.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the parties to the proceeding below were defendants City of New York, Police Officer Selena D. Holmes, Daniel Shapiro, Spencer Burnet, John Doe 1, police officer, John Doe 2, supervisor at precinct house, and Police Officer John Shultz.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENTS OF THE FACTS.....	3
REASONS FOR GRANTING THE PETITION	6

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER ON A SUMMARY JUDGMENT MOTION AND AS A MATTER OF LAW POLICE OFFICERS DO NOT USE EXCESSIVE FORCE WHEN ARRESTING A COOPERATING, NON-VIOLENT SUSPECT WHO THEY KNOW IS INJURED IF THEY USE REAR-HANDCUFFS CAUSING SIGNIFICANT PAIN, BUT DO NOT NECESSARILY CAUSE AN ADDITIONAL INJURY.

CONCLUSION	14
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APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit, dated February 9, 2018, affirming summary judgment in part and reversing in part.	App. 1
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Opinion and Order of the United States District Court for the Eastern District of New York, dated August 3, 2016, granting the defendants summary judgment.	App. 20
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TABLE OF AUTHORITIES

CASES

<i>Aceto v. Kachajian</i> , 240 F.Supp.2d 121 (D. Mass. 2003)	10
<i>Bastien v. Goddard</i> , 279 F.3d 10 (1st Cir. 2002)	11
<i>Baynes v. Cleland</i> , 799 F.3d 600 (6th Cir. 2015), <i>cert. denied</i> , 136 S.Ct. 1381 (2016)	10
<i>Beckles v. City of New York</i> , 492 Fed.Appx. 181 (2d Cir. 2012)	12
<i>Cortez v. McCauley</i> , 478 F. 3d 1108 (10 th Cir. 2007)	9
<i>Crumley v. City of St. Paul</i> , 324 F.3d 1003 (8 th Cir. 2003)	11
<i>Fisher v. City of Las Cruces</i> , 584 F.3d 888 (10 th Cir. 2009)	10
<i>Glenn v. City of Tyler</i> , 242 F.3d 307 (5th Cir. 2001)	11
<i>Graham v. Connor</i> , 490 U.S. 386 (1989)	6, 9, 11, 12
<i>Herzog v. Village of Winnetka</i> , 309 F.3d 1041 (7 th Cir. 2002)	11

<i>Hunt v. Massi</i> , 773 F.3d 361 (1 st Cir. 2014)	8
<i>Jackson v. Lubelan</i> , 657 Fed.Appx. 497 (6 th Cir. 2016)	11
<i>Kisela v. Hughes</i> , 138 S.Ct. 1148 (2018)	8
<i>Kopec v. Tate</i> , 361 F.3d 772 (3d Cir.), <i>cert. denied</i> , 543 U.S. 956 (2004)	10
<i>Morrison v. Bd. Of Trustees of Green Twp.</i> , 583 F.3d 394 (6th Cir. 2009)	11
<i>Rabin v. Flynn</i> , 725 F.3d 628 (7 th Cir. 2013)	10
<i>Shen v. City of New York, et al</i> , 2018 WL 798289 (2d Cir. 2018).....	1
<i>Turek v. Saluga</i> , 47 Fed.Appx. 746 (6th Cir. 2002), <i>cert. denied</i> , 539 U.S. 903 (2003)	11
<i>E.W. v. Dolgos</i> , 884 F.3d 172 (4th Cir. 2018)	13
<i>Vondrak v. City of Las Cruces</i> , 535 F.3d 1198 (10th Cir. 2008), <i>cert. denied</i> , 555 U.S. 1137 (2009)	10
<i>Wall v. County of Orange</i> , 364 F.3d 1107 (9th Cir. 2004)	10

<i>Walton v. City of Southfield</i> , 995 F.2d 1331 (6th Cir.1993)	9
---	---

<i>Wilkins v. Gaddy</i> , 559 U.S. 34 (2010)	11
---	----

CONSTITUTION, STATUTES AND RULES

U.S. Constitution	
Amend. IV	1, 6, 7, 8
Amend. XIV.....	1, 8
28 U.S.C., §1254(1).....	1
42 U.S.C., §1983.....	2, 4

OTHER AUTHORITIES

New York State Division of Criminal Justice Services Crime Reporting Program, Criminal Justice Statistics, <i>Adult Arrests: 2008-2017</i> , Computerized Crime History File (as of 2/16/18), <i>available at</i> http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYork.pdf	8
U.S. Dep't. of Justice, Federal Bureau of Investigation, <i>Crime in the United States, 2015</i> , <i>available at</i> https://www.bjs.gov/content/pub/pdf/puof.pdf	8

U.S. Dep't. of Justice, Bureau of Justice Statistics,
Police Use of Force Collection of National Data,
(revised January December 6, 1998), *available at*
<https://www.bjs.gov/content/pub/pdf/puof.pdf>..... 8

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unpublished; it appears at *Shen v. City of New York, et al*, 2018 WL 798289 (2d Cir. 2018) and is set forth at App. 1. The opinion and order of the United States District Court for the Southern District of New York (Hon. Katherine B. Forrest), dated August 3, 2016 is unpublished and is set forth at App. 20.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 9, 2018. (App. 1) This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

Section 1.... . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE FACTS

On September 16, 2011, petitioner Ziming Shen, an Asian-American, was brutally assaulted by a photographer, Daniel Shapiro, who was desperate to take photographs of Shen and his wife as they exited the federal courthouse in Brooklyn. Shapiro pursued Shen down several streets, as Shen tried to escape and defend himself. Shapiro, swinging a huge camera, called Shen racially derogatory names and punched and kicked him, resulting in Shen's suffering serious injuries, including a fracture of his right arm/shoulder. (A.580, 695, 819, 1485 (Shen EBTs and affidavit); A.1505-11, 1514, 1522-24, 1526-35, 1542-43)

A bystander advised the police and two 911 calls were made: the first reported that a photographer had assaulted a man (Shen), who was lying on the ground with a broken arm; the second, by Shapiro, reported that Shen needed an ambulance. (A.261, 372-74, 1602-04) When the police arrived moments later, Shen, unable to stand, was visibly injured. Without speaking to Shen or any of the witnesses to find out what happened, the police arrested Shen after talking only to Shapiro, who had a slight nosebleed and then lied about what had happened. (A.376-77, 720, 1306-08, 1314, 1316, 1320-21, 1604) Shen's broken arm was obvious; still, the police placed him in rear-handcuffs, ignoring his cries of pain. (A.389-90, 724-26, 728-29, 1509) Shen did not resist arrest. The charges against him were later dismissed.

Shen sued the City of New York, the photographers, and several police officers alleging numerous federal and state causes of action, including a claim that the police officers used excessive force in

violation of 42 U.S.C. §1983 when they placed him in rear handcuffs despite knowing of the severe injury to his shoulder and arm. (A.21)

For summary judgment purposes, it was undisputed that the police knew about the injury. When the police arrived, Shen was on the ground and in obvious pain. Officer Mraz, the first officer on the scene, admitted he first approached “an Asian guy laying on the ground” (A.376), but claimed he could not understand him because of a “language barrier” (A.383), though Shen speaks English (as his depositions reflect). Nonetheless, Shen’s shoulder injury was so apparent, Mraz immediately asked Shapiro, “how did [Shen] end up on the ground *with an injured shoulder*.” (A.389-90, 1551) Officer Aronowitz and Sergeant Muia, both of whom participated in placing Shen in rear handcuffs, also knew about Shen’s arm injury. (A.352, 397, 1568)

At his deposition, Shen testified that, after he fell, he tried to stand up, but could not, and called for help. (A.712, 718, 720) A police officer told him he was under arrest and another told him to stand up. When he said he could not, the officer said something like, “c’mon you can stand up. Don’t pretend that you’re ba-ba-ba, you know. *So I say no, no, no, my arm is broken, I cannot stand up.*” (A.721-23)

Shen testified that *while* and *after* he was handcuffed he told the police officers “*my arm is broken. I’m feel very hurt,*” and the officers should not rear-cuff him – “*I’m very hurt. Don’t do that.*” (A.724-26, 728-29, 899) Shen also testified that the injury to his arm was obvious. His arm was dangling. He

testified that he complained repeatedly that the handcuffs increased his pain. (A.728-29)

At the hospital, Shen was x-rayed, examined, and diagnosed with a fractured arm; his arm was placed in a sling. (A.1616) Nevertheless, on discharge, Officer Nunez, who accompanied him to the hospital, again tried to rear-handcuff him. The doctor would not allow it unless Nunez signed a document admitting he was instructed not to do so. (A.758-61, 1616) After that, Shen's right arm was not rear-handcuffed. (A.762)

The defendants moved for summary judgment and the district court granted summary judgment to all the defendants on *all* claims. (App. 21) As to the excessive force claim, the court, failing to read the evidence in the light most favorable to Shen, the non-movant, decided that there was no evidence that Shen told the police officers that he was in pain *after* he was handcuffed – though, at his deposition, Shen testified that he did – and then concluded that rear-handcuffing Shen caused, at most, “momentary pain.” (App. 43)

Shen appealed to the Court of Appeals for the Second Circuit, which affirmed the grant of summary judgment, except reversing summary judgment as to a state claim for malicious prosecution against Shapiro, the photographer. (App. 19) Without reaching the question of whether the police officers had qualified immunity, the Court, though recognizing that the police caused Shen to “experience[] significant pain” (App. 7), rejected Shen's excessive force claim because “he has offered no evidence that the handcuffing caused him any further injury other than that he had

already suffered from the encounter with Shapiro.”
(App. 8) ¹

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER ON A SUMMARY JUDGMENT MOTION AND AS A MATTER OF LAW POLICE OFFICERS DO NOT USE EXCESSIVE FORCE WHEN ARRESTING A COOPERATING, NON-VIOLENT SUSPECT WHO THEY KNOW IS INJURED IF THEY USE REAR-HANDCUFFS CAUSING SIGNIFICANT PAIN, BUT DO NOT NECESSARILY CAUSE AN ADDITIONAL INJURY.

The use of excessive force during an arrest is a “seizure” protected by the Fourth Amendment. An “excessive force” claim is tested under an “objective reasonableness” standard. *Graham v. Connor*, 490 U.S. 386, 394-97 (1989). The “proper application” of this test “requires careful attention to the facts and circumstances of each particular case,” including

¹ Shen submitted evidence that the handcuffing caused additional injury, but the district court refused to consider it and the Second Circuit misinterpreted it. Shen submitted the affidavit of Dr. Jeffrey Shapiro (SPA.22, n.18), an experienced orthopedist, who reviewed the hospital records and radiographs of the injury and noted that Shen had suffered “a proximal humeral fracture to the right shoulder...with evidence of some angular deformity.” (A.1650) This injury, coupled with the rear-handcuffing, according to Dr. Shapiro, would have caused Shen to suffer “substantial or extreme pain,” and that “movement at the fracture” (from the rear-handcuffs) would cause his bone to rub “on the surrounding soft tissues,” exacerbating the pain. (A.1651).

consideration of 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.” *Id.* at 396. Because the standard is objective, the police officer’s motive and intent are not relevant. *Id.* at 398 (“an officer’s evil intentions will not make a Fourth Amendment violation out of an objective reasonable use of force, nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.”). “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* at 396.

This case involves what began as an unexceptional scenario, undoubtedly one that police officers confront throughout the country daily: the police receive a 911 call that there has been a fight and that someone is injured. Unclear as to what has happened or who is at fault, the police make an arrest.

In this case, the unexceptional rapidly morphed into a colossal injustice. The police, without conducting any investigation, arrested the victim of the assault, an Asian-American, who was cooperative, unarmed, and non-violent. It was clear to the police that the situation was no longer volatile. The arrestee was on the ground, injured and in pain, and the police knew this. Nonetheless, though the victim-arrestee posed no threat to the police, disregarding the nature of the arrestee’s injury and his cries of pain, the police used rear-handcuffs to restrain him, causing him significant pain and aggravating his pre-existing injury.

Police officers routinely use handcuffs, most often, rear handcuffs, in effectuating an arrest. <https://www.bjs.gov/content/pub/pdf/puof.pdf>. FBI statistics reflect that, in 2015, nationwide, there were an estimated 10,797,088 arrests, the vast majority of which were for non-violent crimes. <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29>. In 2017, in New York County alone, there were 64,642 arrests of adults. <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYork.pdf>. Since millions of people are rear-handcuffed each year, the question of when the use of rear handcuffs constitutes excessive force in violation of a suspect's Fourth and Fourteenth Amendment rights is of vital importance.

The courts agree that restraining a suspect with handcuffs constitutes a use of force.² But there are conflicting decisions on when the otherwise routine use of rear-handcuffs becomes constitutionally impermissible. In *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018), the Court held that “general statements of the law” about what constitutes the use of excessive force do not provide police officers with sufficient guidance on what degree of force is excessive, thus entitling them to qualified immunity. The Court

² There is an inconsistent approach to how these claims are analyzed. Some courts, before assessing the issue of qualified immunity, first address whether the use of the handcuffs constituted excessive force under the circumstances of the case, as did the Second Circuit here. Other courts principally focus on whether the police have qualified immunity and whether the law against using rear handcuffs when the police know it is causing the arrestee extreme pain is clearly established. *See e.g., Hunt v. Massi*, 773 F.3d 361, 367 (1st Cir. 2014).

reiterated that “precedent involving similar facts,” can provide the police with “notice that a specific use of force is unlawful.” *Id.*, citing *Mullenix v. Luna*, 136 S. Ct. 305, 312 (2015) (“We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate”), quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

Graham announces a “general[] statement[] of the law” but provides little guidance on how to apply that law. There is a lack of consensus as to when the use of rear-handcuffs constitutes excessive force. The question presented here provides this Court with the opportunity to clarify this recurring issue, and, especially, to decide whether, *as a matter of law*, there is no constitutional violation based on the use of excessive force when the police, aware that a cooperative, non-threatening, non-violent arrestee is injured, rear-handcuff the arrestee causing him to experience significant pain but do not cause the arrestee to suffer a new injury.

Several courts have held that rear-handcuffing a compliant and non-threatening arrestee who has a pre-existing injury constitutes excessive force, or, at the very least, raises a question for the jury, if the arrestee experiences significant pain and the police are aware of the injury. Generally, the test for excessiveness is whether the degree of force was “greater [] than would have been reasonably necessary to effect a lawful arrest.” *Cortez v. McCauley*, 478 F. 3d 1108, 1127 (10th Cir. 2007) *See Walton v. City of Southfield*, 995 F.2d 1331, 1342 (6th Cir.1993) (“An excessive use of force claim could be premised on [the officer’s] handcuffing [the plaintiff] if he knew that she

had an injured arm and if he believed that she posed no threat to him”); *Fisher v. City of Las Cruces*, 584 F.3d 888, 893 (10th Cir. 2009) (the question is whether the manner in which the police officers handcuffed, “forcibly behind his back while he suffered from gun shot wounds,” was objectively reasonable); *Rabin v. Flynn*, 725 F.3d 628,636 (7th Cir. 2013) (summary judgment not appropriate where arrestee informed police of pre-existing injury and that handcuffs were causing pain and police refused to loosen handcuffs). *Accord Aceto v. Kachajian*, 240 F.Supp.2d 121 (D. Mass. 2003) (rear-handcuffing a non-threatening, non-violent, cooperative arrestee who informs the police of pre-existing injury constitutes excessive force).

When an arrestee has already been injured, the police are on notice *before* they place him in rear-handcuffs that the use of this type of restraint could exacerbate the injury. But several courts have held that a pre-existing injury is not a pre-requisite to an excessive force claim and that an unduly tight use of handcuffs that causes severe pain or injury can constitute an excessive use of force. *See, e.g., Baynes v. Cleland*, 799 F.3d 600, 608 (6th Cir. 2015), *cert. denied*, 136 S.Ct. 1381 (2016); (plaintiff must show he complained handcuffs were too tight, officer ignored complaints, and plaintiff experienced some physical injury; see cases cited); *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1209 (10th Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009) (right to be free from unduly tight handcuffing is clearly established); *Wall v. County of Orange*, 364 F.3d 1107, 1112 (9th Cir. 2004) (“well-established that overly tight handcuffing can constitute excessive force”); *Kopec v. Tate*, 361 F.3d 772 (3^d Cir.), *cert. denied*, 543 U.S. 956 (2004) (same);

Bastien v. Goddard, 279 F.3d 10 (1st Cir. 2002) (reversible error to instruct jury that serious injury was required); *Herzog v. Village of Winnetka*, 309 F.3d 1041, 1043 (7th Cir. 2002) (refusal to loosen chafing handcuffs may constitute excessive force). *Accord Turek v. Saluga*, 47 Fed.Appx. 746 (6th Cir. 2002), *cert. denied*, 539 U.S. 903 (2003); *Morrison v. Bd. Of Trustees of Green Twp.*, 583 F.3d 394 (6th Cir. 2009).

This Court has held that pain inflicted by excessive force can constitute a constitutional violation even in the absence of a significant injury. *Wilkins v. Gaddy*, 559 U.S. 34 (2010). Nonetheless, when rear-handcuffs are used, there is still some disagreement about the *degree* of injury that the plaintiff must allege, with some courts requiring that the plaintiff establish more than significant pain, but also a serious or permanent injury. *See e.g., Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001) (“handcuffing too tightly, without more, does not amount to excessive force”), *Crumley v. City of St. Paul*, 324 F.3d 1003 (8th Cir. 2003) (suggesting that the plaintiff must show some type of permanent injury).

Recently, and the Second Circuit’s decision in this case is representative of this new approach, some courts are requiring that the plaintiff establish that the handcuffing caused an additional injury – in essence, ignoring both *Wilkins* and *Graham* in favor of a new test that only looks at whether the use of the handcuffs caused a *new* injury, not whether it caused significant pain or exacerbated an existing injury. *See, e.g., Jackson v. Lubelan*, 657 Fed.Appx. 497 (6th Cir. 2016) (though arrestee repeatedly complained of pain from

handcuffs, he did not establish causal connection between nerve damage and handcuffing).

That is the principle the Second Circuit announced here. Though the Second Circuit earlier had recognized “a general consensus among courts ... that otherwise reasonable force used in handcuffing a suspect may be unreasonable when used against a suspect whom the officer knows to be injured,” if the arrest involves a suspect who either has a visible injury or is cooperating, *Beckles v. City of New York*, 492 Fed. Appx. 181, 182 (2d Cir. 2012), in this case, the Court disregarded that consensus. In assessing the excessive force claim in this case, the Second Circuit did not consider whether it was objectively reasonable to rear-handcuff a non-violent, non-threatening suspect, ignoring his cries of pain, while knowing that his arm and shoulder were severely injured, likely fractured. Bypassing the established legal analysis, the Second Circuit created an additional burden of proof on a plaintiff alleging excessive force *even to raise an issue for the jury*: regardless of whether the force used to restrain the plaintiff was necessary and regardless of whether the rear-handcuffing caused significant pain or aggravated an existing injury, the plaintiff, as a matter of law, cannot show that his constitutional right to be free from an unreasonable seizure has been violated unless the police have caused him a *new* injury.

It is vital that this Court decide whether this new principle is consistent with *Wilkins* and *Graham*. Unless the law is clarified, police officers who use unnecessary and excessive force to restrain an arrestee may be cloaked with qualified immunity because of the

absence of a clear precedent on the issue. *See, e.g., E.W. v. Dolgos*, 884 F.3d 172 (4th Cir. 2018) (though handcuffing student constituted excessive force and was objectively unreasonable, not clearly established at the time so no cause of action.) This discourages the police from reconsidering procedures that are unnecessarily painful and from adopting a more reasonable approach to the use of rear-handcuffs.

Excessive force claims involving rear-handcuffing are a recurring problem for the police and the courts. Though every case will rest on its own set of facts, it is vitally important for the police to know whether it is “objectively reasonable” as a matter of law to rear-handcuff a cooperating, non-violent arrestee during a non-volatile arrest if the restraint causes significant pain or exacerbates a pre-existing injury.

CONCLUSION

Petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: April 30, 2018

APPENDIX

App. 1

2018 WL 798289

Only the Westlaw citation is currently available.
This case was not selected for publication in West's
Federal Reporter.

RULINGS BY SUMMARY ORDER DO NOT HAVE
PRECEDENTIAL EFFECT. CITATION TO A SUM-
MARY ORDER FILED ON OR AFTER JANUARY 1,
2007, IS PERMITTED AND IS GOVERNED BY
FEDERAL RULE OF APPELLATE PROCEDURE
32.1 AND THIS COURT'S LOCAL RULE 32.1.1.
WHEN CITING A SUMMARY ORDER IN A DOC-
UMENT FILED WITH THIS COURT, A PARTY
MUST CITE EITHER THE FEDERAL APPENDIX
OR AN ELECTRONIC DATABASE (WITH THE
NOTATION "SUMMARY ORDER"). A PARTY CIT-
ING A SUMMARY ORDER MUST SERVE A COPY
OF IT ON ANY PARTY NOT REPRESENTED BY
COUNSEL.

United States Court of Appeals,
Second Circuit.

ZIMING SHEN, Plaintiff-Appellant,

v.

CITY OF NEW YORK, Police Officer Evan Aronowitz,
Police Officer Selena D. Holmes, Police Officer Michael
Mraz, Daniel Shapiro, Spencer Burnett, John Doe 1,
Police Officer John Doe 2, supervisor at precinct house,
Police Officer John Shultz, Defendants-Appellees.*

No. 16-2780

|

February 9, 2018

*
- The Clerk of Court is directed to
amend the caption as set forth
above.

Appeal from an August 3, 2016, judgment of the
United States District Court for the Southern District
of New York (Forrest, J.).

***1 UPON DUE CONSIDERATION, IT IS HEREBY
ORDERED, ADJUDGED, AND DECREED** that the
judgment of the district court is **AFFIRMED IN PART
AND VACATED IN PART**, and the case is **RE-
MANDED** for proceedings consistent with this sum-
mary order.

Attorneys and Law Firms

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OFFICER JOHN DOE 2, AND POLICE OFFICER
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Present: Barrington D. Parker, Richard C. Wesley,
Christopher F. Droney, Circuit Judges.

Opinion

Plaintiff-Appellant Ziming Shen appeals from a judgment of the district court granting Defendants-Appellees' motions for summary judgment. Shen challenges the dismissal of certain claims he brought pursuant to federal and state law against two photographers, six New York City police officers, and the City of New York in connection with an altercation between Shen and the photographers and Shen's subsequent arrest. We assume the parties' familiarity with the underlying facts, record of prior proceedings, and issues on appeal.

I. Background

On September 16, 2011, Shen and his wife exited the federal courthouse in Brooklyn, New York, after attending a court appearance in a federal criminal proceeding against them involving charges of defrauding a federal nutrition program. Upon leaving the courthouse, they encountered a group of professional news photographers covering his court appearance. As Shen approached the waiting photographers, he made punching and kicking gestures, but did not make physical contact with them. He then moved further

down the sidewalk, where he encountered Defendant-Appellee Daniel Shapiro, one of the photographers. The parties dispute what occurred during this initial exchange between Shen and Shapiro, but everyone agrees that Shen's arm became entangled in the camera strap of one of Shapiro's cameras.

Once the camera strap was untangled from Shen's arm, Shen proceeded away from the courthouse, and the photographers followed him. At some point, an altercation ensued between Shapiro and Shen. The parties dispute both who initiated the encounter and what took place during it, but it ended with Shen on the ground. As a result of the altercation, Shen suffered several injuries, including a fractured shoulder, while Shapiro suffered a bloody nose, and one of Shapiro's cameras was damaged.

Following the confrontation, Shapiro called 911. During the call, Shapiro informed the 911 operator that Shen might require an ambulance and that Shen had assaulted him. New York City police then responded to the scene, and Shapiro informed the officers that Shen had assaulted him. The police arrested Shen, who remained on the ground until his arrest, and transported him to the hospital for treatment of his injuries. Shen claims that, prior to his arrest, he informed the police that they were arresting the wrong person. One eyewitness also informed one of the police officers present at the scene that Shapiro was the aggressor.

Shapiro and Spencer Burnett, another photographer, went to the local police precinct. While there, the police interviewed Shapiro, who asserted that Shen assaulted him. The next day, the district attorney's office

also interviewed Shapiro, who again stated that Shen attacked him. The police and the district attorney's office also interviewed Burnett, who reported that he saw only the initial contact between Shen and Shapiro immediately outside the courthouse. Shen was then charged with several New York state offenses in connection with the altercation, including assault in the third degree. In November 2011, Shapiro again signed a statement for the district attorney's office affirming his claim of assault. Burnett also reiterated his statement in February 2012. The charges were dismissed by the state court in February 2014.

***2** Shen commenced this suit in September 2014. The second amended complaint asserted numerous federal statutory and constitutional claims and related state law claims against Shapiro, Burnett, police officers allegedly involved in responding to the altercation, and New York City. Defendants moved for summary judgment as to all of Shen's claims. The district court granted defendants' motions and dismissed the action. This appeal followed.

On appeal, Shen argues that the district court erred in dismissing his federal and state claims for: (1) excessive force; (2) malicious prosecution; (3) failure to train and/or supervise; (4) negligence; and (5) violations of 42 U.S.C. §§ 1981 and 1985. We review a district court's decision to grant summary judgment *de novo*, affirming "only if the moving party has demonstrated that there is no genuine issue as to any material fact and that judgment as a matter of law is warranted." Jaegly v. Couch, 439 F.3d 149, 151 (2d Cir. 2006). "In determining whether a case presents triable issues of fact, we, like the district court, may not make credi-

bility determinations or weigh the evidence, and we must resolve all ambiguities and draw all permissible inferences in favor of the non-moving party.” *Id.* (citations omitted).

Applying this standard of review, we affirm the majority of the district court’s conclusions for substantially the same reasons stated in the district court’s opinion and order. *See Shen v. City of N.Y.*, No. 14-CV-7358 (KBF), 2016 WL 4126541 (S.D.N.Y. Aug. 2, 2016). However, we vacate and remand as to the state law malicious prosecution claim against Shapiro. Although defendants argue—and the district court concluded—that some of the claims are subject to dismissal on more than one basis, we note here only those grounds that are necessary to our decision.

II. Excessive Force Claims Against Police Officer Defendants

Shen claims that the police officers used excessive force in handcuffing him and transporting him to the hospital. Under the Fourth Amendment, a police officer may not use excessive force in effecting an arrest. *See Tracy v. Freshwater*, 623 F.3d 90, 96 (2d Cir. 2010). Whether a use of force is excessive is measured according to a standard of “ ‘objective reasonableness,’ ” which “requires balancing the nature and quality of the intrusion on the plaintiff’s Fourth Amendment interests against the countervailing governmental interests at stake.” *Id.* (quoting *Bryant v. City of N.Y.*, 404 F.3d 128, 136 (2d Cir. 2005)). In assessing the reasonableness of a use of force, “we are careful to evaluate the record from the perspective of a reasonable officer on the scene, rather than with the 20/20 vi-

sion of hindsight.” *Id.* (internal quotation marks omitted). “Proper application of the test of reasonableness in this context requires careful attention to the facts and circumstances of each particular case....” *Rogoz v. City of Hartford*, 796 F.3d 236, 246 (2d Cir. 2015) (alterations and internal quotation marks omitted).

We agree with the district court’s conclusion that, even when the evidence is construed in the light most favorable to Shen, the record does not support a finding that the officers involved in Shen’s arrest used excessive force. It is undisputed that when the officers arrived on the scene, they encountered a volatile situation—reports of a physical blows struck, evidence of injury to both parties, and a crowd in the area of combat. As to the actual use of force at issue, as the district court noted, Shen has pleaded his claim for excessive force in a way that implicates the period of time only from when he was handcuffed to when he was placed in an ambulance to be transported to the hospital. Shen does not dispute that this window was very brief; indeed, when asked at his deposition “what happened next” after he had been handcuffed, Shen responded: “I think the ambulance c[a]me. They pull[ed] me on the ambulance.” App. 733. Moreover, for the brief period at issue, the record shows that Shen was handcuffed with two sets of connected handcuffs because of his complaints to the officers about the shoulder injury he sustained in the altercation with Shapiro, such that his hands rested near the side of his hips rather than completely behind him. Finally, although Shen testified at his deposition that he experienced significant pain from the injury to his shoulder, including during the brief period that he was hand-

cuffed, he has offered no evidence that the handcuffing caused him any further injury other than that he had already suffered from the encounter with Shapiro.¹

¹ Shen argues that the district court erred in declining to consider an expert affidavit he submitted in opposition to defendants' motions for summary judgment. We identify no error in the district court's decision to exclude the affidavit, but even if the exclusion had been error, the expert opinion Shen points to—that handcuffing Shen in a certain way may have caused him pain—does not support his argument that the handcuffing caused him further injury, so any such error would be harmless.

***3** The undisputed facts thus show that the officers responded to an incident of reported violence by handcuffing Shen, the suspected aggressor, using two sets of handcuffs to accommodate his shoulder injury and in a way that did not result in any further injury to Shen, for (as relevant here) only the brief period of time that it took to place Shen in an ambulance to be transported immediately to a hospital for treatment of his injuries. In these circumstances, the district court correctly concluded that no reasonable juror could find that the officers' conduct was objectively unreasonable. Shen's excessive force claim therefore fails as a matter of law.²

² The district court also concluded that the police officers were entitled to qualified immunity for their use of the two sets of handcuffs. We need not reach that issue here.

III. Malicious Prosecution

a. Claims against the City of New York and the Police Officers

To prevail on a malicious prosecution claim under either 42 U.S.C. § 1983 or New York state law,³ Shen must show: (1) the initiation or continuation of a criminal proceeding against him; (2) the termination of the proceeding in his favor; (3) that there was no probable cause for the proceeding; and (4) that the proceeding was instituted with malice. Mitchell v. City of N.Y., 841 F.3d 72, 79 (2d Cir. 2016). Because lack of probable cause is a necessary element, “the existence of probable cause is a complete defense to a claim of malicious prosecution....” Savino v. City of N.Y., 331 F.3d 63, 72 (2d Cir. 2003).

³ Shen brought his malicious prosecution claim against the police officers under both § 1983 and state law. The analysis for both is the same, as Shen must make the same showing for both the § 1983 and state law claim. See Kinzer v. Jackson, 316 F.3d 139, 143 (2d Cir. 2003). As to Shapiro and Burnett, Shen brought his malicious prosecution claim only under state law, which we address below.

Here, the district court correctly concluded that the existence of probable cause defeats Shen’s claim for malicious prosecution against the police officers and the City. Because Shen withdrew his false arrest claims in his opposition to summary judgment, Appellant Br. 19–20, we need only review whether there was probable cause to pursue criminal charges against

Shen after his initial arrest. *See Dufort v. City of N.Y.*, 874 F.3d 338, 351–54 (2d Cir. 2017).

It is undisputed that Shapiro called 911 and reported that he had been assaulted, and that once the police arrived, Shapiro stated to the officers that Shen had committed the assault. Shapiro’s report was corroborated by his bloody nose and his damaged camera. As we have previously recognized, “[i]nformation about criminal activity provided by a single complainant can establish probable cause when that information is sufficiently reliable and corroborated.” *Oliveira v. Mayer*, 23 F.3d 642, 647 (2d Cir. 1994). Similarly, in the context of a false arrest claim, we have stated that “it is well-established that a law enforcement official has probable cause to arrest if he received his information from some person, normally the putative victim or eyewitness.” *Martinez v. Simonetti*, 202 F.3d 625, 634 (2d Cir. 2000) (quoting *Miloslavsky v. AES Eng’g Soc’y*, 808 F.Supp. 351, 355 (S.D.N.Y. 1992), *aff’d*, 993 F.2d 1534 (2d Cir. 1993)). Here, Shapiro’s report of assault to the authorities and his visible injuries at the time of the officers’ arrival is relevant to the decision to continue to pursue prosecution after the initial arrest. *See, e.g., Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 128 (2d Cir. 1997) (finding police had probable cause to conclude an assault had occurred, “[g]iven [the alleged victim’s] version of events and his visible injuries”).

***4** The conflicting accounts that the officers received about Shen’s responsibility for the alleged assault also did not eliminate probable cause to undertake the arrest. Shen argues that two eyewitnesses stated in their depositions that Shapiro was the aggressor, and that

one of them informed Police Officer Mraz that “[the police] were arresting the wrong person.” Appellant Br. 41. However, in similar circumstances involving conflicting accounts of who was at fault in a fight, “we have found probable cause where a police officer was presented with different stories from an alleged victim and the arrestee.” Curley v. Village of Suffern, 268 F.3d 65, 70 (2d Cir. 2001); *see also Ricciuti*, 124 F.3d at 128 (finding probable cause where police officer was confronted with two conflicting accounts of altercation). More importantly for the malicious prosecution claim, following Shen’s arrest, Shapiro and Burnett provided statements at the local precinct to the police, and the next day provided statements to the district attorney’s office. In light of both the officers’ observations at the scene and the follow-up interviews, the undisputed facts show that the police officers had probable cause to believe Shen had assaulted Shapiro and were justified in pursuing his prosecution.⁴ *See Stansbury v. Wertman*, 721 F.3d 84, 95 (2d Cir. 2013) (noting that probable cause in the context of malicious prosecution has been described as “such facts and circumstances as would lead a reasonably prudent person to believe the plaintiff guilty”). Contrary to Shen’s arguments on appeal, the relevant inquiry for probable cause is not whether a jury would have been compelled to accept the accounts of Shapiro and Burnett. As we have explained, the probable-cause standard “does not require absolute certainty.” Boyd v. City of N.Y., 336 F.3d 72, 76 (2d Cir. 2003). Moreover, Shen has failed to offer any basis on which to conclude that the probable cause against him “dissipate[d]” based on “the discovery of some intervening fact” that made apparent “the groundless nature of the charge.” Kinzer v. Jackson, 316 F.3d 139, 144 (2d Cir. 2003)

(quoting Lowth v. Town of Cheektowaga, 82 F.3d 563, 571 (2d Cir. 1996)). Because the existence of probable cause defeats Shen’s claim of malicious prosecution as to the City and the police officers, the district court properly granted summary judgment on this claim as to these defendants.

⁴ Shen challenges this conclusion by the district court on the ground that the court’s decision cited to four pages of deposition testimony that do not appear to have been filed by any party on the CM/ECF docket. The City defendants acknowledge this discrepancy and speculate that “one of the parties must have inadvertently included [the pages] in a courtesy copy submitted to chambers.” City Appellees’ Br. 29 n.5. Assuming *arguendo* that it was error for the district court to consider these pages, any such error was harmless, as Shen does not dispute the accuracy of the citations, and in any event, the district court’s brief references to these pages do not support factual points that were dispositive to the court’s analysis.

b. Claim Against Shapiro

However, we reach a different result as to Defendant Shapiro. We first distinguish probable cause for the claim against Shapiro from the claim against the police officers. In the context of a malicious prosecution claim under New York state law, a plaintiff can defeat a showing of probable cause “by evidence establishing that the police witnesses have not made a complete and full statement of facts ... to the District Attorney, that they have misrepresented or falsified evidence,

that they have withheld evidence[,] or otherwise acted in bad faith.” Torres v. Jones, 26 N.Y.3d 742, 27 N.Y.S.3d 468, 47 N.E.3d 747, 762 (2016) (quoting Colon v. City of N.Y., 60 N.Y.2d 78, 468 N.Y.S.2d 453, 455 N.E.2d 1248, 1250 (1983)); *see also* Dufort, 874 F.3d at 353 (noting that plaintiff bore the burden of “establishing that Defendants misled ... the prosecutors by either withholding or misrepresenting evidence” in order to overcome presumption of probable cause); Rothstein v. Carriere, 373 F.3d 275, 283-85 (2d Cir. 2004) (applying this exception for probable cause to malicious prosecution claim against government co-operator). New York courts have long made clear that this exception to the finding of probable cause applies where a private citizen provides false information to law enforcement. *See, e.g.,* Ramos v. City of N.Y., 285 A.D.2d 284, 300, 729 N.Y.S.2d 678 (1st Dep’t 2001) (“The record here, for the present motion, sufficiently supports plaintiff’s claim, for purposes of denying defendant’s motion, that witnesses had not made a complete and full statement of facts either to ... the District Attorney, that they had misrepresented or falsified evidence, and that they sufficiently withheld evidence or otherwise acted in bad faith, which, if proved, would overcome the presumption of probable cause. At this stage of the proceeding, it cannot be found as a matter of law that defendant prosecuted plaintiff with probable cause and without malice.”).

In this case, a genuine dispute of material fact exists regarding whether Shapiro misrepresented his altercation with Shen to the arresting officers, and later at the precinct, and still later to the district attorney’s office. Two disinterested witnesses who saw the altercation testified in their depositions that Shapiro

was the aggressor. One of these witnesses reported this claim to the police at the time of Shen's arrest. In addition, Shen himself protested that he was innocent. These facts place the veracity of Shapiro's account into substantial question, and prevent summary judgment as to whether there was probable cause for the malicious prosecution claim against Shapiro.

***5** As a result, we turn to the other elements of Shen's malicious prosecution claim against Shapiro. For reasons similar to those above, we conclude that genuine disputes of material fact exist as to the other elements of Shapiro's claim. First, as to the initiation or continuation of a criminal proceeding element, New York courts have indicated that providing false information to the police may satisfy this element. *See Williams v. CVS Pharmacy, Inc.*, 126 A.D.3d 890, 892, 6 N.Y.S.3d 78 (2d Dep't 2015) (noting that "giving false information to the authorities" may constitute initiation if, "at the time the information was provided, the defendant knew it to be false, yet still gave it to the police or District Attorney"); *Weiss v. Hotung*, 26 A.D.3d 855, 857, 809 N.Y.S.2d 376 (4th Dep't 2006) (noting that "intentionally g[i]v[ing] false information to the police" could constitute "commencement of the criminal proceeding against plaintiff"). These same facts are probative of malice, the fourth element in a malicious prosecution claim. *See Torres*, 47 N.E.3d at 762 ("[T]he plaintiff may show malice and overcome the presumption of probable cause with proof that the defendant falsified evidence in bad faith and that, without the falsified evidence, the authorities' suspicion of the plaintiff would not have fully ripened into probable cause."). In addition, Shen testified in his deposition that Shapiro cursed at him and used a racial epithet

against him, which also place the malice question into dispute. Thus, summary judgment is inappropriate as to elements one, three, and four of Shen's malicious prosecution claim against Shapiro.

Finally, Shen clearly satisfies the favorable termination element of a malicious prosecution claim. The charges against him were dismissed on speedy trial grounds, and under New York law, a speedy trial dismissal constitutes favorable termination. *See Rogers v. City of Amsterdam*, 303 F.3d 155, 160 (2d Cir. 2002). Thus, we conclude triable issues of fact exist regarding Shen's malicious prosecution claim as to Shapiro.

Before turning to Defendant Burnett, we must resolve one final issue. The district court also dismissed the state-law malicious prosecution claims as time-barred. The district court erred in this respect: New York's one-year statute of limitations commences only upon favorable termination of a prosecution. *Williams*, 126 A.D.3d at 891. Here, the charges against Shen were dismissed on February 23, 2014, and he filed his complaint within one year, on September 11, 2014. On appeal, the defendants concede that the claims were timely. Thus, the statute of limitations does not bar Shen's malicious prosecution claim against Shapiro.

c. Claim Against Burnett

The rationale that requires us to remand to the district court the malicious prosecution claim as to Shapiro does not apply to Burnett.⁵ Shen concedes in his brief that Burnett was present only at the initial encounter immediately outside the courthouse. Appellant Br. 40.

In his statements to the police and district attorney, that followed Shen's arrest, Burnett reported only as to Shen's actions when Shen immediately left the courthouse, and did not represent that he was present at the later altercation when Shen was injured. Specifically, Burnett represented that "[Shen] did repeatedly kick at and swing [his] arms at [Burnett], [Shapiro], and other photographers." App. 343. In his deposition, Shen did not contest that he made such gestures while exiting the courthouse, and the record (including numerous photographs) establishes that Shen did so. *See, e.g.*, App. 631. Accordingly, we conclude that there is not a genuine dispute of material fact regarding whether Burnett also misled the police, and affirm the district court's grant of summary judgment as to Burnett.

⁵ In his opposition to defendants' motions for summary judgment, Shen abandoned all other claims as to Burnett except for the malicious prosecution claim.

On remand, given the dismissal of all claims over which the district court has original jurisdiction, the court may decline to exercise supplemental jurisdiction over this remaining state law claim. 28 U.S.C. § 1367(c)(3); *see Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 305 (2d Cir. 2003). The court should balance the factors of "judicial economy, convenience, fairness, and comity" in making this discretionary determination. *Id.* at 305 (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988)).

IV. *Monell* Claim against the City of New York

***6** Shen argues that the district court abused its discretion in denying him the opportunity to amend his complaint to clarify that Count 16, which was pleaded as a pendent state-law claim, was in fact a federal claim for *Monell* liability against the City pursuant to 42 U.S.C. § 1983. We identify no abuse of discretion here, where Shen’s request for leave to amend was filed nearly two months after the district court issued an order adjourning the pretrial schedule in the case in light of the court’s intention to grant summary judgment for defendants. Moreover, any such amendment would have been futile, as *Monell* does not create liability absent an independent constitutional violation, *see Segal v. City of N.Y.*, 459 F.3d 207, 219 (2d Cir. 2006), and the district court correctly granted summary judgment as to Shen’s underlying constitutional claims. We therefore reject Shen’s arguments with respect to his purported *Monell* claim against the City.

V. Negligence Claim against Shapiro

Shen challenges the district court’s dismissal of his state-law negligence claim, arguing that the court erred in concluding that the claim did not sound in negligence because the underlying conduct by Shapiro was intentional. More specifically, Shen contends that he is permitted to plead alternative claims, so the allegations of intentional assault do not preclude him from also asserting a negligence claim on the theory that Shapiro is liable for “chasing Shen while carrying dangerous equipment and accidentally injuring him.” Appellant Reply Br. 18. Although this may be possible as a legal theory, Shen’s argument finds no support in the record. As the district court noted, Shen testified

that Shapiro “attack[ed] [him],” “grabbed [him],” “us[ed] a camera to hit [him],” “pulled [him] down to the ground,” and “us[ed] his knee to hit [him].” App. 674–76, 706, 714. Shapiro also acknowledged the intentional nature of his conduct, testifying that he intended to bring Shen to the ground and “shoved him down.” *Id.* at 1040–41.

Under New York law, “once intentional offensive contact has been established, the actor is liable for assault and not negligence, even when the physical injuries may have been inflicted inadvertently.” *Smith v. Cty. of Erie*, 295 A.D.2d 1010, 1011, 743 N.Y.S.2d 649 (4th Dep’t 2002) (quoting *Salimbene v. Merchants Mut. Ins. Co.*, 217 A.D.2d 991, 994, 629 N.Y.S.2d 913 (4th Dep’t 1995)). Because the record here, construed in the light most favorable to Shen, shows that “[t]he ‘touching’ of [Shen] was neither inadvertent nor accidental,” Shen has asserted a claim “for an assault, not negligent behavior.” *Locke v. N. Gateway Rest., Inc.*, 233 A.D.2d 578, 579, 649 N.Y.S.2d 539 (3d Dep’t 1996); *see also* *Cagliostro v. Madison Square Garden, Inc.*, 73 A.D.3d 534, 535, 901 N.Y.S.2d 222 (1st Dep’t 2010) (dismissing negligence claim as “simply contrary to [plaintiff’s] testimony that he was ‘pushed,’ ‘grabbed,’ ‘pulled,’ and ‘manhandled’ ”). We therefore conclude that the district court properly granted summary judgment as to Shen’s negligence claim.

VI. Violations of §§ 1981 and 1985

Finally, Shen argues that the district court erred in dismissing two claims—for violations of 42 U.S.C. §§ 1981 and 1985—on the basis that Shen’s opposition to summary judgment did not address those claims.⁶ We

have explained that, “in the case of a counseled party, a court may, when appropriate, infer from a party’s partial opposition that relevant claims ... that are not defended have been abandoned.” *Jackson v. Fed. Express*, 766 F.3d 189, 198 (2d Cir. 2014). Such an inference was appropriate here, especially in light of the statement by plaintiff’s counsel that he planned to withdraw many of the claims at issue. Shen’s argument that the district court erroneously dismissed these claims therefore fails.

⁶ These claims include Shen’s allegation of a conspiracy between Shapiro and a police officer to violate Shen’s civil rights.

* * *

***7** We have considered Shen’s remaining arguments and conclude that they are without merit. Accordingly, we **AFFIRM IN PART** and **VACATE IN PART** the judgment of the district court, and we **REMAND** the case to the district court for proceedings consistent with this order.

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United States District Court,

S.D. New York.

Ziming Shen, Plaintiff,

v.

The City of New York, P.O. Evan Aronowitz, P.O.

Selena D. Holmes, P.O. Michael Mraz, P.O. John
Shultz, Daniel Shapiro, and Spencer Burnet, Defend-
ants.

14-cv-7358 (KBF)

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Signed August 1, 2016

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OPINION & ORDER

KATHERINE B. FORREST, District Judge

***1** Plaintiff brings this action against four officers of the New York City Police Department (“NYPD”), the City of New York, and two photographers, asserting federal statutory and constitutional claims and state

law claims arising from an altercation between plaintiff and the photographers and plaintiff's subsequent arrest in Brooklyn, New York on September 16, 2011.

The Court notes at the outset that—as is often the case when a plaintiff brings a hodge-podge of claims—the vast majority of plaintiff's case is legally infirm on its face. There are a number of claims that are clearly time-barred, inappropriately pled against the defendants named, or wholly lacking in legal basis. Defendants moved for summary judgment on a number of these bases, and also argue that plaintiff has not raised a triable issue based on the undisputed facts in the record. For the reasons stated below, defendants' motions are GRANTED.

I. FACTUAL BACKGROUND

The following facts are undisputed unless otherwise specified. The Court refers to only those facts that are relevant for resolution of this motion.¹

¹ Local Rule 56.1 provides that “papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried.” Plaintiff did not submit a list of counterstatements to defendants' Local Rule 56.1 statements of undisputed fact; however, he did submit a document containing statements that he believes to be undisputed. Although plain-

tiff's submission is not formally compliant with Local Rule 56.1, the Court nevertheless has reviewed plaintiff's submission for statements that may dispute defendants' submissions and are supported by record evidence in order to determine the facts which are uncontroverted or are not in genuine dispute. See Giannullo v. City of New York, 322 F.3d 139, 140 (2d Cir. 2003); Holtz v. Rockefeller & Co., 258 F.3d 62, 74 (2d Cir. 2001). The Court also notes that plaintiff's Local Rule 56.1 statement exhibits were filed four days late.

A. The Altercation

The events giving rise to this action occurred after plaintiff and his wife exited the federal courthouse on Cadman Plaza East in Brooklyn, New York on September 16, 2011. Plaintiff and his wife, Joanna Fan, had finished a court appearance related to a federal indictment against them. (Defs. Shapiro & Burnett's Local R. 56.1 Stmt. of Undisputed Facts ("S/B Defs.' 56.1") ¶ 1; Pl.'s Local R. 56.1 Stmt. of Undisputed Facts ("Pl.'s 56.1") ¶ 1.) As they exited the courthouse, they encountered a throng of photographers who began to take photographs of them. (NYPD Officer & City of New York Defendants' Local R. 56.1 Stmt. of Undisputed Facts ("NYPD Defs.' 56.1") ¶ 12; S/B Defs.' 56.1 ¶¶ 1-2; Pl.'s 56.1 ¶ 1.) Defendants allege that plaintiff kicked and yelled at the photographers. (NYPD Defs.' 56.1 ¶ 14; S/B Defs.' 56.1 ¶ 2.) Plaintiff does not contest that he yelled at the photographers and "made certain gestures" towards them, but states that he "did not kick or punch anyone directly and made no physical contact" with the photographers when he came out of the Courthouse. (Pl.'s 56.1 ¶¶ 2-3.) Defendants Daniel Shapiro, a freelance photographer, and Spencer Bur-

nett, a photographer for the New York Post, were present. (S/B Defs.' 56.1 ¶ 2.)

***2** Plaintiff proceeded to run away from the courthouse. (NYPD Defs.' 56.1 ¶ 15; Pl.'s 56.1 ¶ 5.) As plaintiff ran, defendant Shapiro was positioned closely beside him. (NYPD Defs.' 56.1 ¶ 16; Pl.'s 56.1 ¶¶ 5-6.) Plaintiff's right arm became entangled in Shapiro's camera strap. (NYPD Defs.' 56.1 ¶ 17; Pl.'s 56.1 ¶¶ 6-7.) Plaintiff asserts that Shapiro then pulled on and twisted the camera cord, causing plaintiff pain and discomfort. (Pl.'s 56.1 ¶ 6.) Plaintiff also asserts that Shapiro struck him in the body while attempting to retrieve the camera and that Shapiro cursed and used a racial epithet against him. (Pl.'s 56.1 ¶ 6.) Plaintiff's wife then assisted in untying the camera strap from plaintiff's arm. (NYPD Defs.' 56.1 ¶ 18; Pl.'s 56.1 ¶ 9.)

Plaintiff then walked towards the Brooklyn Bridge on Tillary Street. (NYPD Defs.' 56.1 ¶ 19; Pl.'s 56.1 ¶ 9.) His wife had walked in a different direction. (Pl.'s 56.1 ¶ 9.) While walking, plaintiff noticed that Shapiro was following him and taking photographs of him. (NYPD Defs.' 56.1 ¶ 20; Pl.'s 56.1 ¶ 10.) Plaintiff turned around and saw Shapiro a "couple of inches" behind him. (NYPD Defs.' 56.1 ¶ 22; Pl.'s 56.1 ¶ 10.)

An altercation ensued. At one point, plaintiff retrieved two pieces of cardboard from in front of a supermarket named Concord Market. (NYPD Defs.' 56.1 ¶ 23; Pl.'s 56.1 ¶ 10.) Defendants claim that plaintiff threw the cardboard pieces at Shapiro. (NYPD Defs.' 56.1 ¶¶ 24-25.) Plaintiff instead claims that he was using the cardboard to shield himself and "threw [the cardboard] away." (Pl.'s 56.1 ¶ 11.) There is no dispute that the

cardboard did not in fact hit Shapiro. (NYPD Defs.' 56.1 ¶ 24; Pl.'s 56.1 ¶ 11.)

According to plaintiff, Shapiro began to "use a camera to hit me first." (Pl.'s Dep. Tr., Sohn Decl. Ex. E, at 96.)² Plaintiff alleges that he then tried to defend himself. (*Id.* at 97.) Shapiro alleges that plaintiff punched him in the nose, although it is not clear at what time this occurred. (S/B Defs.' 56.1 ¶ 6.) Plaintiff acknowledges that Shapiro sustained a bloody nose sometime after he left the front of the courthouse, but asserts that he never punched Shapiro. (Pl.'s 56.1 ¶ 8.)

² Shapiro testified in his deposition that he did not remember whether he struck plaintiff with his camera. (Shapiro Dep. Tr., Dempsey Decl. Ex. I, at 94.)

At some point, Shapiro pulled plaintiff to the ground. (NYPD Defs.' 56.1 ¶ 26; Pl.'s 56.1 ¶ 12.) It is undisputed that Shapiro intended to bring plaintiff to the ground, but that in so doing, Shapiro "lost his balance and he [fell] over [plaintiff]." (Pl.'s Dep. Tr. 97 ("he tried to pull me down, throw me on down to the ground"); see also Shapiro Dep. Tr., Dempsey Decl. Ex. I, at 89 ("I shoved him down, we both went down"); NYPD Defs.' 56.1 ¶ 26; Pl.'s 56.1 ¶ 21.) Plaintiff contends that when Shapiro fell on top of him, he injured plaintiff's arm or shoulder. (NYPD Defs.' 56.1 ¶ 27; Pl.'s 56.1 ¶¶ 12-13.) Plaintiff also asserts that Shapiro kned him several times and that he then lost consciousness. (Pl.'s 56.1 ¶ 13.) Plaintiff alleges that at some point during the encounter, Shapiro's camera swung around and hit plaintiff's body, causing swell-

ing, bruising, and bleeding. (Pl.'s 56.1 ¶ 12.)³

³ The parties' Rule 56.1 statements do not address where Burnett was during this altercation. There is no suggestion that he participated in the physical interchange between plaintiff and Shapiro.

Shapiro called 911 and reported that he had been assaulted. (NYPD Defs.' 56.1 ¶ 28; Pl.'s 56.1 ¶ 12.) At some point, Shapiro called 911 a second time. (Pl.'s 56.1 ¶ 20.)

B. The Arrest

A bystander approached defendant Officer Mraz, who was on patrol nearby, to inform him that two men were having an argument down the street. (NYPD Defs.' 56.1 ¶ 32.) Officer Mraz approached the intersection where plaintiff and Shapiro were positioned. (NYPD Defs.' 56.1 ¶ 32.) He was the first officer to arrive at the scene. (NYPD Defs.' 56.1 ¶ 33; Pl.'s 56.1 ¶ 17.) He observed plaintiff on the ground and Shapiro bleeding from the nose. (NYPD Defs.' 56.1 ¶ 34-35; Pl.'s 56.1 ¶ 16.) Shapiro identified himself via his press badge and told Officer Mraz that plaintiff had assaulted him. Shapiro also showed the officer his damaged camera. (NYPD Defs.' 56.1 ¶ 37; S/B Defs.' 56.1 ¶ 8; Pl.'s 56.1 ¶ 17.) Officer Mraz then attempted to speak to plaintiff, but could not understand him because of a language barrier. (Pl.'s 56.1 ¶ 17.)

*3 At some point, another police vehicle arrived at the scene. (NYPD Defs.' 56.1 ¶ 38.) Shapiro repeated his allegation that he had been assaulted while working, this time to Officer Aronowitz. (NYPD Defs.' 56.1 ¶ 38;

S/B Defs.’ 56.1 ¶ 8; Pl.’s 56.1 ¶ 19.) Plaintiff was also able to communicate with Officer Aronowitz and stated that his shoulder was injured and that he was the victim. (Pl.’s 56.1 ¶¶ 19, 22.) Plaintiff does not assert that he made any other specific statements to the police about what had occurred.

Plaintiff was then arrested. Sergeant Muia, a patrol supervisor, authorized the arrest. (Pl.’s 56.1 ¶ 20.) Plaintiff asserts that two eyewitnesses, Elissa Krebs and Zakir Hossain were also on the scene. Krebs, who lived nearby and observed Shapiro and Shen on the street in front of Concord Market, stated in a later affidavit that she believed Shapiro was the initial aggressor and that she never saw Shen hitting Shapiro in the face. (Pl.’s 56.1 ¶ 14.)⁴ Krebs stated that she spoke to a police officer about her belief that they arrested the wrong man, and the officer asked for her name and contact information but did not release plaintiff from arrest. (Decl. of Joseph Cacciato (“Cacciato Decl.”) Ex. 2, Krebs Dep. Tr. 56-59.)

⁴ The Court notes that Krebs testified in her deposition that while Shapiro had verbally taunted plaintiff, plaintiff pushed Shapiro before Shapiro swung at plaintiff; she also testified that she did not see the swing land on plaintiff’s body. (Krebs Dep. Tr. 34-37; 44-45.) She also testified that plaintiff kicked Shapiro about fifteen times. (*Id.* at 48-49.)

Hossain, who worked at Concord Market, was also a witness. He did not speak to the officers when they arrived at the scene. (Pl.’s 56.1 ¶ 15; Cacciato Ex. 4, Hossain Dep. Tr. 29.) He also stated that he went back

inside the market after plaintiff was arrested. (Hossain Dep. Tr. 58.)

At the time of plaintiff's arrest, the officers understood that his right arm was injured. (NYPD Defs.' 56.1 ¶ 40; Pl.'s 56.1 ¶¶ 19-21.) Although plaintiff asserts that he was lifted off the ground by an officer by his right arm, photographs of the arrest shows an officer pulling plaintiff up by his left arm. (Pl.'s 56.1 ¶ 22; Cacciato Decl. Ex. 12, at 4-5.)⁵ Plaintiff was handcuffed from the back with two sets of handcuffs attached to each other. (NYPD Defs.' 56.1 ¶ 41; Decl. of Elise Fudim, Ex. V.)⁶ The two handcuffs linked together extended about two feet long. (NYPD Defs.' 56.1 ¶ 42.) Plaintiff alleges that he told the officers after he was arrested that his arm hurt; there is no evidence, however, that plaintiff verbally attributed the pain to the double-linked handcuffs or asked the officers to remove the cuffs. (Pl.'s 56.1 ¶ 21-22.)

⁵ It is not clear based on the photograph itself who the officer was. However, Sergeant Muia testified that he was the one who helped plaintiff up from the ground and was present when plaintiff was handcuffed. (Sohn Decl. Ex. P, Muia Dep. Tr. at 32-36.) It is also unclear who handcuffed plaintiff, as there is no record evidence as to this. (See Pl.'s 56.1 Stmt Ex. 6, Mraz Dep. Tr., at 44-45 (testifying that he was not the arresting officer and that when he "turned around," plaintiff was "already in handcuffs," and that he did not know who put plaintiff in handcuffs)).

⁶ Plaintiff also asserts that he was lifted by both arms into an ambulance by Officer

Mraz and an Officer Patrick, who is not a party in this case. (Pl.'s 56.1 ¶ 23.) However, plaintiff's assertion in his 56.1 Statement cites two deposition transcript pages from Officer Mraz and Officer Nunez's depositions that do not contain any testimony regarding grabbing plaintiff by both his arms to be lifted into the vehicle. (See Cacciato Decl. Ex. 6, Mraz Dep. Tr. 43; Cacciato Decl. Ex. 8, Nunez Dep. Tr. 29.)

C. Hospital Visit

*4 Officer Nunez, who is not a defendant in this action, escorted plaintiff to the hospital from the scene of the arrest. (NYPD Defs.' 56.1 ¶ 50; Pl.'s 56.1 ¶ 23.) After arriving at the hospital, Officer Nunez removed plaintiff's handcuffs when he was triaged. (NYPD Defs.' 56.1 ¶ 51.) Plaintiff was then treated for his injuries. (Pl.'s 56.1 ¶ 23.) Plaintiff was not handcuffed again until he was discharged, at which point Nunez handcuffed plaintiff's uninjured left arm to plaintiff's belt loop. (NYPD Defs.' 56.1 ¶¶ 52-54.)⁷ At some point during that time, plaintiff's wife arrived at the hospital to retrieve his belongings and took photographs of him. (Pl.s' 56.1 ¶ 23.)

⁷ Plaintiff asserts that an officer had stated at the hospital that he wanted to rear handcuff plaintiff, but was told by a physician not to. Plaintiff asserts that the officer required the physician to sign a form with the no-rear-handcuff advice, and that the physician signed it. At no point does plaintiff allege that the officer actually attempted to rear handcuff him. (Pl.'s 56.1 ¶ 23.)

D. Events at the NYPD Precinct

After treatment, plaintiff was taken to the police precinct. (NYPD Defs.' 56.1 ¶ 55; Pl.'s 56.1 ¶ 26.) After he arrived at the precinct, plaintiff stated that he was hungry and was given milk and bread. (NYPD Defs.' 56.1 ¶ 55; Pl.'s 56.1 ¶ 26.) Later, plaintiff told an unidentified male police officer at the precinct that he wanted food, specifically sweets. (NYPD Defs.' 56.1 ¶¶ 60, 62; Pl.'s 56.1 ¶ 26.) The officer stated that he had some leftover cake, and plaintiff decided to eat it. (NYPD Defs.' 56.1 ¶¶ 60, 64.) At the time, plaintiff had low blood sugar. (NYPD Defs.' 56.1 ¶ 57.) However, plaintiff has also had diabetes for about 20 years. (NYPD Defs.' 56.1 ¶ 56; Pl.'s 56.1 ¶ 26.) He knew that if he ate cake, his blood sugar levels could rise to dangerous levels. (NYPD Defs.' 56.1 ¶ 63.) Nevertheless, plaintiff chose to eat the cake. (NYPD Defs.' 56.1 ¶ 63-64.) After eating the cake, plaintiff felt better. (NYPD Defs.' 56.1 ¶ 65.)

Two or three hours later, plaintiff began feeling dizzy. (NYPD Defs.' 56.1 ¶ 66.) He requested and received permission to call his wife to bring him insulin and a coat. (NYPD Defs.' 56.1 ¶ 67; Pl.'s 56.1 ¶ 26.) Plaintiff's wife arrived at the precinct with a coat, a needle, and bottle of insulin, which she left with an officer. (NYPD Defs.' 56.1 ¶ 68; Pl.'s 56.1 ¶ 26.)

Next, an unidentified supervisor at the precinct⁸ advised the officer that the insulin was not allowed, as only medical professionals are allowed to administer insulin to arrestees. (NYPD Defs.' 56.1 ¶¶ 69-70; Pl.'s 56.1 ¶ 26.) Plaintiff was also not permitted to have the coat. (Pl.'s 56.1 ¶ 26.) Plaintiff advised an officer that he needed to get treatment for his high blood sugar.

(NYPD Defs.' 56.1 ¶ 72.) At the time, the practice of the precinct was to call for an ambulance. (NYPD Defs.' 56.1 ¶ 71.)⁹

⁸ There is no record evidence as to the identity of this supervisor.

⁹ Plaintiff alleges that at the precinct, the arm sling that had been provided to him at the first hospital visit had been removed and his injured right arm rested in his shirt; he acknowledges, however, that he does not know how long his arm was out of the sling. (Pl.'s 56.1 ¶ 27.)

Officer Shultz then escorted plaintiff to the hospital to be treated. (NYPD Defs.' 56.1 ¶ 73.)¹⁰ He again only handcuffed plaintiff's left, uninjured arm, but the other side of the cuff was not attached to anything. (NYPD Defs.' 56.1 ¶¶ 74-76.) Upon arrival at the hospital, Officer Shultz cuffed the other end of the handcuff to the hospital bed, leaving the injured arm free. (NYPD Defs.' 56.1 ¶¶ 77-78.) Plaintiff alleges that he complained of tightness in his left wrist and in his legs, and Officer Shultz loosened the cuff on the wrist. (Pl.'s 56.1 ¶ 27.) He also alleges that he sustained injuries to his left wrist or legs as a result of the cuffing. (Pl.'s 56.1 ¶ 28.)¹¹

¹⁰ Plaintiff was brought to the hospital at approximately 4:49 a.m. on September 17, 2011. (NYPD Defs.' 56.1 ¶ 73.) Officer Shultz remained with plaintiff at the hospital for several hours, until approximately 8:20 a.m. (NYPD Defs.' 56.1 ¶ 79.)

¹¹ Plaintiff alleges that his injuries were worsened by the tight cuffing, but it is undisputed that his right arm was not affected when he was transported to the hospital a second time. (Pl.'s 56.1 ¶¶ 27-28.)

E. Subsequent Criminal Proceedings

***5** Plaintiff was released from custody on September 17, 2011 after posting bail. (S/B Defs.' 56.1 ¶ 11.) After the incident, Shapiro was interviewed by law enforcement. (NYPD Defs.' 56.1 ¶¶ 43-46, 81-83.) Officer Aronowitz photographed Shapiro's face and damaged camera lens. (NYPD Defs.' 56.1 ¶ 47.) Based on Shapiro's statements, the arrest report, which was signed by Officer Aronowitz, stated:

AT TPO C/V [complainant / victim] states that while photographing the above perp at the above location the perp charged at the victim punching and kicking him resulting in a bloody nose. C/V's camera was also damaged by the perp by the perp smacking the camera out of his hands to the ground. Camera is valued at \$16,000 USC.

(NYPD Defs.' 56.1 ¶¶ 48-49; Decl. of Liza Sohn, Ex. I.) Shapiro also spoke with a prosecutor in the King's County District Attorney's Office, explaining that plaintiff had punched and kicked him. (NYPD Defs.' 56.1 ¶¶ 81-83.) The District Attorney's Office also interviewed Burnett. He stated that plaintiff had kicked and punched towards his direction while outside the courthouse. (NYPD Defs.' 56.1 ¶¶ 84-85.)

A representative of the District Attorney's Office filed a criminal complaint against plaintiff for the assault of Shapiro and Burnett. (S/B Defs.' 56.1 ¶ 12.) He was charged with Assault in the Third Degree and arraigned on September 17, 2011. (S/B Defs.' 56.1 ¶ 10.) Later, in December 2011 and February 2012, Shapiro and Burnett signed documents in support of the investigation against plaintiff. (S/B Defs.' 56.1 ¶ 12.) The charges were dismissed in February 2014. (S/B Defs.' 56.1 ¶ 13.)

F. Plaintiff's Allegations and Procedural History

Plaintiff filed a notice of claim against the NYPD officers on April 11, 2014. (Sohn Decl. Ex. A.) Plaintiff first brought this action on September 11, 2014. (ECF No. 1.) Plaintiff amended his Complaint on December 5, 2014 and again on May 15, 2015. (ECF Nos. 4, 32.) In his Second Amended Complaint ("SAC"), plaintiff brings the following claims:

- Federal claims against Shapiro and Burnett:
 - o Count I, for violation of equal protection of and access to law pursuant to 42 U.S.C. § 1981;
 - o Count XIV, for violation of First and Fourteenth Amendment rights to access to courts; and
 - o Count XV, for conspiracy with racial animus, pursuant to 42 U.S.C. § 1985.¹²
- State law claims against Shapiro and Burnett:
 - o Count IV, for negligent or intentional infliction of emotional distress ("NIED" or "IIED");

- o Count VII, for malicious prosecution;
- o Count VIII, for abuse of process;
- o Count IX, for prima facie tort; and
- o Count XXI, for making “false and injurious statements.”

– State law claims against Shapiro only:

- o Count II, for assault and battery;
- o Count III, for false imprisonment;
- o Count V, for negligent assault; and
- o Count VI, for negligence.

– Federal claims against the City of New York and the NYPD officer defendants:

- o Count X, for violation of equal protection and access to law pursuant to 42 U.S.C. § 1981;
- o Count XI, for “Civil Rights Violations” of Constitutional Amendments I, IV, V, and XIV;
- o Count XII, for excessive force;
- o Count XIII, for failure to “properly care for” plaintiff; and
- o Count XIV, for violation of First and Fourteenth Amendment access to courts pursuant to 42 U.S.C. § 1983.

– State law claims against the City of New York and the NYPD officer defendants:

- o Count VIII, for abuse of process;
- o Count IX, for a prima facie tort;
- *6** o Count XVII, for malicious prosecution;
- o Count XVIII, for false imprisonment and arrest;

- o Count XIX, for negligent or intentional infliction of emotional distress;
- o Count XX, for negligence; and
- o Count XXI, for making “false and injurious statements.”¹³

– State claims against the City of New York only:

- o Count XVI, for failure to properly hire, train, and supervise.

¹² This claim is asserted against only Shapiro and a “John Doe” defendant.

¹³ This claim is asserted against all defendants, except “John Doe 2.”

Defendants moved for summary judgment on each of the above claims.

II. LEGAL FRAMEWORK

“The court shall grant summary judgment if 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). The moving party bears the initial burden of demonstrating “the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When the moving party does not bear the ultimate burden on a particular claim or issue, it need only make a showing that the non-moving party lacks evidence from which a reasonable jury could find in the non-moving party’s favor at trial. Id. at 322-23.

In making a determination on summary judgment, the court must “construe all evidence in the light most favorable to the nonmoving party, drawing all inferences and resolving all ambiguities in its favor.” Dickerson v. Napolitano, 604 F.3d 732, 740 (2d Cir. 2010). Once the moving party has discharged its burden, the opposing party must set out specific facts showing a genuine issue of material fact for trial. Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009). “[A] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment,” as “[m]ere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist.” Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010) (internal citations omitted). In addition, “[o]nly admissible evidence need be considered by the trial court in ruling on a motion for summary judgment.” Porter v. Quarantillo, 722 F.3d 94, 97 (2d Cir. 2013) (internal quotation marks and citation omitted).

Only disputes relating to material facts—i.e., “facts that might affect the outcome of the suit under the governing law”—will properly preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (stating that the nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts”). The Court should not accept evidence presented by the nonmoving party that is so “blatantly contradicted by the record ... that no reasonable jury could believe it.” Scott v. Harris, 550 U.S. 372, 380 (2007); see also Zellner v. Summer-

lin, 494 F.3d 344, 371 (2d Cir. 2007) (“Incontrovertible evidence relied on by the moving party ... should be credited by the court on [a summary judgment] motion if it so utterly discredits the opposing party’s version that no reasonable juror could fail to believe the version advanced by the moving party.”).

III. DISCUSSION

***7** The Court addresses several preliminary issues before addressing the substance of plaintiff’s claims.

First, the Court notes that plaintiff does not oppose several of defendants’ bases for summary judgment, including on statute of limitation grounds for most of the state law claims and a patent inability to meet basic elements in several other claims. Plaintiff only opposes summary judgment on the following 7 claims out of 21 originally pled.

- Against NYPD and City defendants, Counts XII, XIII, XVIII, and XVII: 1) excessive force, 2) inadequate medical care, 3) false arrest, and 4) malicious prosecution;
- Against the City only, Count XVI: 5) failure to properly hire, train, and supervise; and
- Against Shapiro only, Counts VII and VI: 6) malicious prosecution and 7) negligence.

Therefore, the Court dismisses the remaining claims as unopposed:¹⁴

- All claims against Burnett;
- Counts I, X, XI, XIV, & XV: federal claims

under 42 U.S.C. § 1981 and 1985, claims regarding access to courts, and generalized “civil rights violations”;

– Against Shapiro, Counts II, III, IV, and V: state law tort claims of assault and battery, false imprisonment, NIED/ IIED, and negligent assault;

– Against NYPD and City defendants, Counts XIX and XX: NIED/IIED and negligence;

– Against all defendants, Counts VIII, IX, and XXI: abuse of process, state law claims of prima facie tort, and false and injurious statements.

¹⁴ Plaintiff had indicated that he planned to dismiss many of these claims, but nevertheless did not actually do so. (See Pl.’s Feb. 29, 2016 Ltr., ECF No. 69, at 2.)

Second, the Court notes that plaintiff has asserted no facts supporting any involvement by defendant Sergeant Selena Holmes. (NYPD Defs.’ 56.1 ¶¶ 86-87.) Plaintiff’s Rule 56.1 statement is devoid of any reference to Sergeant Holmes. Because plaintiff has failed to state a claim against her or point to any personal involvement by her as to the events in this lawsuit, she is hereby dismissed as a defendant.

Third, while plaintiff has asserted claims against “John Doe 1” and “John Doe 2,” the time to substitute parties has long passed. These defendants are therefore also dismissed from this action.

A. Federal Constitutional Claims

Plaintiff asserts five federal claims against the NYPD and City defendants. However, he only opposes only two such claims on summary judgment: 1) inadequate medical care and 2) excessive force.

1. Inadequate Medical Care Claim

Plaintiff alleges that “New York City, Police Officers, and Jon Doe 2” failed to “provide for plaintiff’s medical needs and in fact caused his medical condition to worsen.” He asserts that Officers Aronowitz, Mraz, Nunez, and Shultz are liable because they denied him access to insulin after he entered “diabetic shock” while held at the precinct. This claim fails because plaintiff has failed to plead or offer any proof of direct involvement by any of the named officers.

First, Officer Nunez is not a defendant in this action. Second, plaintiff has proffered no evidence that any of the named officers were personally involved for this claim, which is required under § 1983.

***8** A defendant may be personally involved in a constitutional deprivation within the meaning of 42 U.S.C. § 1983 in several ways. The defendant may have directly participated in the infraction. A supervisory official, after learning of the violation through a report or appeal, may have failed to remedy the wrong. A supervisory official may be liable because he or she created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue. Lastly, a supervisory

official may be personally liable if he or she was grossly negligent in managing subordinates who caused the unlawful condition or event.

Williams v. Smith, 781 F.2d 319, 323-24 (2d Cir. 1986). Plaintiff has not proffered facts to support any of these theories of liability. For example, he has never pled or provided any evidence that any defendants in this action were responsible for plaintiff at the precinct when the diabetes episode occurred, or made any decisions to not allow plaintiff access to the needle and insulin his wife brought to the precinct. Although Officer Shultz took plaintiff to the hospital to be treated for his diabetes, there is no record evidence that he was present at the precinct or had any interaction with plaintiff before that point. Plaintiff has also never pled or proffered any evidence that any of the defendant officers had a supervisory role as to the denial of plaintiff's request for insulin. For these reasons, this claim is dismissed.

2. Excessive Force Claim

Plaintiff's claim for excessive force is based on his allegation that the officers who arrested him placed him in rear handcuffs even though they knew he had injured his right arm or shoulder.¹⁵ Plaintiff has not raised a triable issue on this claim.

¹⁵ In his briefing, plaintiff alternates between acknowledging that his cause of action is based on the rear handcuffing given his shoulder injury and making arguments regarding "tight" handcuffing. (Pl.'s Mem. at 6-7.) He also appears to transform the

handcuffing issue from a Fourth Amendment excessive force claim to an Eighth Amendment claim for deliberate indifference to medical needs. Plaintiff cannot raise new claims in opposition to a motion for summary judgment.

“Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake... [T]he right to make an arrest ... necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” Graham v. Connor, 490 U.S. 386, 394–95 (1989) (citations and internal quotation marks omitted). To sustain a claim for excessive force, plaintiff must show that the use of force is “objectively sufficiently serious or harmful enough to be actionable.” United States v. Walsh, 194 F.3d 37, 50 (2d Cir. 1999). Plaintiff has not done so here.

The Court notes that plaintiff discusses this issue based on facts that are not supported by the record evidence. The factual circumstance surrounding the rear-handcuffing claim is more limited than he asserts.

First, Sergeant Muia helped plaintiff to his feet by pulling on plaintiff’s uninjured left arm before plaintiff was placed in handcuffs.¹⁶ Second, plaintiff was handcuffed with two sets of handcuffs attached to each other, such that his arms were bent back far less than they would be had he been cuffed with one set of handcuffs. The photographic evidence shows that plaintiff’s arms were only bent back slightly and his

hands rested a few inches behind the sides of his hips. Third, although plaintiff complained of his arm being broken and being in pain both before and after he was arrested, there is no record evidence that after plaintiff was handcuffed, he told the officers that the double-linked cuffs exacerbated his arm pain or asked them to modify or remove his cuffs. Fourth, it is undisputed that Officer Nunez took plaintiff to a hospital immediately after he was arrested and plaintiff's right hand was never cuffed again after he was triaged at the hospital. Finally, Officer Nunez is not a defendant in this action. Based on these undisputed facts, and construing other facts in plaintiff's favor, the record evidence is insufficient to raise a triable issue. Balancing "the nature and quality of the intrusion on [plaintiff's] Fourth Amendment interests" (causing additional pain to plaintiff who, prior to arrest, suffered a shoulder injury) "against the countervailing governmental interests at stake" (securing plaintiff, who was just arrested, for the purposes of bringing him to the hospital) leads to the conclusion that the officers' use of handcuffs was reasonable. See Graham, 490 U.S. at 394–95.

¹⁶ Although plaintiff asserts the officers pulled him up by his right arm, the Court does not disregard the incontrovertible record. See Scott, 550 U.S. at 380 ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.")

***9** In this case, the incontrovertible photographic evidence shows that plaintiff was not—as he claims in his deposition—rear-handcuffed with one set of handcuffs, but rather with two sets of handcuffs extending across his back such that his hands rested near the side of his hips. (See Fudim Decl. Ex. V.) That the officers accommodated plaintiff’s medical injury to his arm vitiates in favor of reasonableness, as it directly contradicts plaintiff’s claim that they had “blatant disregard” for his existing injury. See Sanchez v. Port Auth. of New York & New Jersey, 08 Civ. 1028 RRM, 2012 WL 1068078, at *9 (E.D.N.Y. Mar. 29, 2012). Instead, it unquestionably demonstrates that the officers were attempting to alleviate plaintiff’s injury.

Furthermore, there is no record evidence that the officers who handcuffed plaintiff had reason to know that their accommodation led to an unreasonable exacerbation of plaintiff’s pain. While plaintiff alleges that he repeatedly told officers that he was in pain because of his broken arm—which he acknowledges he complained of even before he was handcuffed, (Pl.’s 56.1 ¶¶ 21-22), there is no record evidence that he told the officers that even the double linked handcuffs still caused him pain. See Kalfus v. New York & Presbyterian Hosp., 476 Fed.Appx. 877, 881 (2d Cir. 2012) (“Because the patrolmen had no reason to know that Kalfus’s existing shoulder injury might be aggravated if his arms were pulled or he were handcuffed, the amount of force that they used to respond to Kalfus’s resistance to arrest could not be deemed objectively ‘unreasonable’ by any reasonable jury.” (emphasis in original)).

No reasonable trier of fact could find that the officers’

conduct in this case was objectively unreasonable—especially given that in this action, the force is only measured from the time the cuffs were placed on plaintiff's right wrist and the time he was handed over to Officer Nunez for transport to the hospital. The duration of any discomfort attributable to any defendant in this action is very short. It is uncontroverted that plaintiff was placed into an ambulance immediately after he was handcuffed. It is undisputed that Officer Nunez, a non-defendant, accompanied plaintiff to the hospital. Therefore, plaintiff's claim in this case is only cognizable to the extent that it is asserted against the officer or officers¹⁷ who handcuffed him and for the period before he was put in the ambulance.

¹⁷ Although it is unclear which officer actually handcuffed plaintiff, it is undisputed that Sergeant Muia is the one who ordered that plaintiff be handcuffed. (NYPD Defs.' 56.1 ¶ 39.) While Aronowitz and Mraz may have been present during or participated in the handcuffing, there is also no evidence that Officer Shultz had any interaction with plaintiff prior to the second hospital visit later in the night.

Finally, plaintiff has not adduced record evidence to show that the momentary pain he felt for that period of time can constitute a constitutional violation. While the Court assumes for the purposes of this motion that plaintiff did feel pain, plaintiff has not met his burden in establishing defendants caused him compensable injury. The fact that handcuffs "caused pain" is "generally insufficient to constitute excessive force." Gonzalez v. City of New York, 98 Civ. 3084 (ILG), 2000 WL

516682, at *4 (E.D.N.Y. Mar. 7, 2000); see also
Perlleshi v. Cty. of Westchester, 98 Civ. 6927 (CM),
2000 WL 554294, at *6 (S.D.N.Y. Apr. 24, 2000).
Plaintiff has adduced no evidence that whatever pain
that was exacerbated by the accommodation of dou-
ble-linked handcuffs—above and beyond what he
would have felt from his broken arm even if not
handcuffed—is sufficient to lead to rise to a constitu-
tional violation.¹⁸

¹⁸ The Court notes that plaintiff has at-
tempted to introduce the affidavit of a
purported expert witness, Dr. Jeffrey
Shapiro. (Cacciato Decl. Ex. 15.) The Court
will not accept such an affidavit or the
opinions contained within. First, plaintiff
apparently never timely disclosed Dr.
Shapiro pursuant to the Federal Rules and
instead introduced his affidavit for the first
time in his (late) filing of exhibits to his
Rule 56.1 statement. Second, plaintiff's own
Rule 56.1 statement makes no reference to
Dr. Shapiro. Third, the contents of the af-
fidavit are apparently based on an as-
sumption that plaintiff was rear-handcuffed
with one set of handcuffs, which is untrue.
The contents are also apparently based on a
combination of effects of alleged conduct
that are not a part of this case—such as the
allegation that the officers hoisted plaintiff
by both arms, and therefore do not consti-
tute a properly formed expert opinion in
this case.

***10** Moreover, even if plaintiff has supported a con-
stitutional violation, the officers would nevertheless be
entitled to qualified immunity. Qualified immunity
attaches unless the right plaintiff claims was “so
clearly established” that “it is obvious that no rea-

sonably competent officer would have concluded” the amount of force used during plaintiff’s arrest violated the law. Malley v. Briggs, 475 U.S. 335, 341 (1986); see also Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012). This is a high bar, as qualified immunity “gives ample room for mistaken judgments” and “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.” Malley, 475 U.S. at 335, 341.

It is simply not the case that “existing precedent placed the conclusion that [defendants] acted unreasonably in these circumstances ‘beyond debate.’ ” Mullenix v. Luna, 136 S. Ct. 305, 209 (2015) (quoting Ashcroft v. Al-Kidd, 563 U.S. 731, 741 (2011)). Plaintiff has identified no existing precedent that using double-linked handcuffs to transport an arrestee with an arm injury to the hospital constitutes excessive force. Plaintiff’s citations to cases regarding rear-handcuffing generally are inapposite, since it is the officer’s specific conduct in this case that is in question.¹⁹ Based on the record evidence, it is clear that the officers used two sets of handcuffs to attempt to minimize the impact of the cuffing on plaintiff’s injury. That their efforts nevertheless resulted in some discomfort to plaintiff does not save plaintiff’s claim, as it is not “obvious that no reasonably competent officer would have concluded” the amount of force used in handcuffing plaintiff by using an accommodation of double-linked cuffs violated the law. Malley, 475 U.S. at 341.

¹⁹ There is absolutely no evidence of double-linked handcuffing in either case plaintiff cites. See Rodriguez v. McGinnis, No.

98-CV-6031CJS, 2004 WL 1145911, at *1 (W.D.N.Y. May 18, 2004); Sarauer v. Frank, No. 04-C-273-C, 2004 WL 2324981, at *1 (W.D. Wis. Oct. 6, 2004). The Court has also conducted a search and has found none regarding using two sets of linked cuffs in response to an arm or shoulder injury.

3. Other Claims

The Court notes that in their briefing on this motion, plaintiff and the NYPD and City defendants appear to address three claims pled as pendent state law claims as § 1983 claims: false imprisonment and arrest, malicious prosecution, and failure to properly hire, train, and supervise. The Court takes the claims as they are pled: as state law tort claims. Plaintiff's Second Amended Complaint clearly labels which claims are "pend[en]t claims" and which are "constitutional claims;" he even labels all of the federal claims with the specific statute through which he aims to sue. (See SAC at ¶12-32.) Because plaintiff had clearly chosen to plead these claims as state law claims, and not pursuant to 42 U.S.C. § 1983, the Court treats them as they are pled because parties cannot assert new causes of action through later briefing.

Even if these claims were pled as § 1983 claims, they would still fail.

Defendant's false arrest claim is premised on the idea that the police should have arrested Shapiro instead. However, even if there were probable cause to arrest Shapiro, the existence of probable cause to arrest someone else does not defeat probable cause to arrest plaintiff. It is undisputed that Shapiro called 911

twice, stating that he had been assaulted by plaintiff. When the police arrived, Shapiro reiterated his statement that plaintiff had assaulted him. Shapiro also had a bloody nose and broken camera. This alone was enough to constitute probable cause to believe that plaintiff had indeed assaulted Shapiro, as Shapiro was the victim / eyewitness and had corroboration of the assault, namely through his injury. See Oliveira v. Mayer, 23 F.3d 642, 647 (2d Cir. 1994) (“Information about criminal activity provided by a single complainant can establish probable cause when that information is sufficiently reliable and corroborated.”); Martinez v. Simonetti, 202 F.3d 625, 634 (2d Cir. 2000) (“[I]t is well-established that a law enforcement official has probable cause to arrest if he received his information from some person, normally the putative victim or eyewitness.” (internal citations omitted)); Fox v. City of New York, No. 03 CIV. 2268(FM), 2004 WL 856299, at *6 (S.D.N.Y. Apr. 20, 2004); Moreno v. City of New Haven Dep’t of Police Serv., 604 F. Supp. 2d 364, 373 (D. Conn. 2009).

***11** Plaintiff’s argument that the officers should not have arrested plaintiff based on Krebs’s expression of surprise that plaintiff was arrested instead of Shapiro is unsupported by the law.²⁰ An officer is “is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest.” Martinez, 202 F.3d at 635-36. The ultimate arbiter of whether Shapiro’s story holds up is the factfinder—or at least the district attorney. Id. See also Krause v. Bennett, 887 F.2d 362, 372 (2d Cir. 1989).

²⁰ The Court is not convinced that Krebs’s statements based on her observations

would have worked against probable cause to arrest plaintiff. While Krebs stated she subjectively believed Shapiro was the aggressor, she also testified that she saw plaintiff push Shapiro before Shapiro took any physical action and that plaintiff kicked Shapiro fifteen times. (Krebs Dep. Tr. 34-37, 48-49.)

In any event, the arresting officers are qualifiedly immune because it was objectively reasonable for them to believe that plaintiff had assaulted Shapiro, given the information they were provided at the scene. “An arresting officer is entitled to qualified immunity” for a false arrest claim if, as it was here, “it was objectively reasonable for the officer to believe that probable cause existed.” Lee v. Sandberg, 136 F.3d 94, 102 (2d Cir. 1997). In addition, an officer is also qualifiedly immune if “officers of reasonable competence could disagree on whether the probable cause test was met.” Id. Here, both are certainly true.

Plaintiff also cannot support a claim for malicious prosecution against the officers. A plaintiff alleging malicious prosecution must establish “(1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff’s favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant’s actions.” Manganiello v. City of New York, 612 F.3d 149, 160-61 (2d Cir. 2010) (internal citations omitted). In this case, probable cause defeats the malicious prosecution claim. Johnson v. Constantellis, 221 Fed.Appx. 48, 50 (2d Cir. 2007). Plaintiff has also failed to proffer any facts demonstrating that any officer had an “active role in the prosecution, such as

giving advice and encouragement or importuning the authorities to act,” which is generally required for an officer to be liable for malicious prosecution. Bermudez v. City of New York, 790 F.3d 368, 377 (2d Cir. 2015). Additionally, plaintiff has adduced no evidence suggesting actual malice on the part of any officer.

Finally, plaintiff cannot support a Monell claim. Monell requires that a plaintiff must allege that a particular municipal policy or custom contributed to the deprivation of his rights. Monell v. Department of Social Services, 436 U.S. 658, 694 (1978); see also Davis v. City of New York, 75 Fed.Appx. 827, 829 (2d Cir. 2003) (collecting cases). Plaintiff cannot sue the City under § 1983 “for an injury inflicted solely by its employees or agents,” but rather must identify a “policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy,” pursuant to which it inflicted the injury. Monell, 438 U.S. at 694; see also Oklahoma v. Tuttle, 471 U.S. 808 (1985). Thus, plaintiff must both “prove the existence of a municipal policy or custom” and “establish a causal connection—an affirmative link—between the policy and the deprivation of his constitutional rights.” Vippolis v. Haverstraw, 768 F.2d 40, 44 (2d Cir. 1985) (internal quotation marks omitted). Here, plaintiff merely alleges in conclusory terms that the city failed to adequately select, train, and supervise its employees, but does not identify any “policy or custom” that caused any deprivations of constitutional rights. (SAC ¶¶ 174-184.) Thus, plaintiff’s allegations fail as a matter of law to support a Monell claim.

B. State Law Claims

***12** Having dismissed all of plaintiff's federal claims, the Court now turns to his state law claims against various defendants. The Court dismisses all claims but the negligence claim against Shapiro as unopposed or otherwise time-barred. The negligence claim against Shapiro cannot withstand scrutiny and fails as a matter of law.

1. State Law Claims against NYPD and City Defendants

Plaintiff asserts a number of state law tort claims against the NYPD officer defendants and the City of New York. Although plaintiff appears to construe some of them as federal claims, the Court has already discussed why they fail on that basis. As state law claims, they are unquestionably time-barred. In New York, no action may be "prosecuted against the city or any agency or an employee unless notice of claim shall have been made and served upon the city" "within ninety days after the claim arises." N.Y. Gen. Mun. Law §§ 50-k(6); Hardy v. New York City Health & Hosps. Corp., 164 F.3d 789, 793-94 (2d Cir. 1999) ("Notice of claim requirements are construed strictly."). All the causes of action in this case arose on September 15, 2011 or shortly thereafter. Plaintiff filed his notice of claim on April 11, 2014. Therefore, plaintiff's state law claims against the NYPD officers and the City of New York are untimely and hereby dismissed.²¹

²¹ The only such claims that were not already dismissed as unopposed are false imprisonment and false arrest, malicious prose-

cution, and failure to properly hire, train, and supervise.

2. Malicious Prosecution Claim Against Shapiro and Burnett

Plaintiff asserts a number of state law intentional tort claims against defendants Shapiro and Burnett, but does not oppose summary judgment on nearly all of them. Plaintiff does oppose summary judgment on the malicious prosecution claim against Shapiro. This claim, like the other intentional tort claims against Shapiro and Burnett, is time-barred. The statute of limitations for intentional torts in New York is one year. N.Y.C.P.L.R. § 215(3).²² Because the events giving rise to those claims occurred on September 16, 2011 or shortly thereafter, any claims for intentional torts based on those claims must have been brought a year later. However, plaintiff did not bring his claims until September 11, 2014, nearly three years later. Therefore, this claim is dismissed as time-barred. N.Y.C.P.L.R. § 215(3); see also Ross v. Louise Wise Servs., Inc., 868 N.E.2d 189, 197 (N.Y. 2007); Della Villa v. Constantino, 668 N.Y.S.2d 724, 725 (App. Div. 1998); Gallagher v. Directors Guild of Am., Inc., 533 N.Y.S.2d 863, 865 (App. Div. 1988).

²² Plaintiff is not entitled to the tolling provision of N.Y.C.P.L.R. § 215(8) because there is no record evidence that Shapiro and Burnett were subject to criminal action regarding the events in this case. Even if plaintiff were subject to the tolling provision, his claim would have been time barred within a year of the imposition of sentence or other final disposition of any criminal action. Id.; N.Y. Crim. Proc. Law § 1.20(16).

3. Negligence Claim Against Shapiro

Plaintiff also alleges negligence against Shapiro. The first aspect of plaintiff's negligence claim arises from the interaction in front of the Courthouse. He alleges that Shapiro "grabb[ed] the [plaintiff] and prevent[ed] him from running away, by causing his camera straps to become wrapped around the plaintiff's wrist." (SAC ¶¶ 35-38.) However, plaintiff has failed to raise a triable issue as to the required elements of causation and injury. (SAC ¶¶ 35-38.) He has failed to proffer a single fact supporting injury as to this initial altercation.

***13** The second aspect of the negligence claim arises from the altercation in front of Concord Market. Plaintiff states in his Second Amended Complaint that Shapiro intentionally assaulted plaintiff and that during the altercation, he (Shapiro) also acted negligently by failing to secure his camera and losing his balance and falling on top of plaintiff.²³ (SAC ¶¶ 114-15.) Plaintiff also asserts, however, that Shapiro intentionally "use[d] a camera to hit" plaintiff. (See Pl.'s Dep. Tr. 96.) It is also undisputed that Shapiro "tried to pull [plaintiff] down," and in the process of doing so, fell on plaintiff. (Pl.'s Dep. Tr. 97.) The assertion of this intentional aggression removes the claim from the ambit of one for negligence. See Dunn v. Brown, 690 N.Y.S.2d 81, 81 (App. Div. 1999) ("[A]llegations of intentional conduct cannot form the basis of a claim founded in negligence"); Cummins v. Schouten, 554 N.Y.S.2d 369 (App. Div. 1990). The uncontroverted evidence demonstrates that any conduct relating to the camera and the bringing of plaintiff to the ground are intentional actions, and therefore cannot support a claim for negligence. Under New

York law, “once intentional offensive contact has been established, the actor is liable for assault and not negligence inasmuch as there is no such thing as a negligent assault. This is so even if the actor did not intend to cause injury” Cagliostro v. Madison Square Garden, Inc., 901 N.Y.S.2d 222, 223 (App. Div. 2010); Mazzaferro v. Albany Motel Enterprises, Inc., 515 N.Y.S.2d 631, 632–33 (App Div. 1987); Restatement (Second) of Torts § 16 (1965) (“If an act is done with the intention of inflicting upon another an offensive but not a harmful bodily contact, or of putting another in apprehension of either a harmful or offensive bodily contact, and such act causes a bodily contact to the other, the actor is liable to the other for a battery although the act was not done with the intention of bringing about the resulting bodily harm.”).

²³ The Court notes that the negligence claim appears to be duplicative of the other two claims—which are also dismissed—regarding the exact same alleged conduct. Plaintiff alleges assault and battery against Shapiro in Count II for striking him with his fists, feet, forearm, and camera, as well as throwing plaintiff “down to the concrete twice.” (SAC ¶¶ 83-89.) The very same conduct that plaintiff alleges is negligent in Count VI is characterized as intentional assault in Count II. Moreover, in Count V, plaintiff alleges negligent assault against Shapiro for “negligently inflict[ing] bodily injuries ... as a result of [his] negligent and unlawful physical contact with plaintiff.” (SAC ¶ 109.) This appears to be the same conduct referred to in the negligence claim in Count VI. As discussed above, the two other claims are dismissed. The assault and battery

claim is barred by the statute of limitations, and plaintiff has failed to oppose summary judgment on the negligent assault claim. Moreover, “no cause of action to recover damages for negligent assault exists in New York.” Wrase v. Bosco, 706 N.Y.S.2d 434, 435 (App. Div. 2000).

In all events, an assault claim is time-barred. N.Y. Gen. Mun. Law §§ 50–k(6). Plaintiff cannot “avoid the running of the limitations period merely by attempting to couch the claim as one sounding in negligence.” Tong v. Target, Inc., 922 N.Y.S.2d 458 (App. Div. 2011). This claim is therefore dismissed.

IV. CONCLUSION

For the reasons set forth above, defendants’ motions for summary judgment are GRANTED. The Clerk of Court is directed to terminate the motions at ECF Nos. 57, 59, 65, 96, and 98, and to terminate this action.

SO ORDERED.

All Citations

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