

<b>Williams v City of New York</b>
2013 NY Slip Op 33960(U)
September 18, 2013
Supreme Court, Kings County
Docket Number: 42210/2003
Judge: Sylvia G. Ash
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At an IAS Term, Part 20 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of September, 2013.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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TARRELL WILLIAMS,

Plaintiff(s),

- against -

THE CITY OF NEW YORK, WILLIAM DANCHAK, RICHARD E. PIGNATELLI, JAMES E. HALLERAN, EDWARD J. DEIGHAN and MICHAEL E. KNOTT,

Defendant(s).

-----X

The following papers numbered 1 to 4 read herein:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_  
\_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_  
Other Papers \_\_\_\_\_

DECISION AND ORDER

Index # 42210/2003

Papers Numbered

1 \_\_\_\_\_  
2 \_\_\_\_\_  
3 \_\_\_\_\_  
4 \_\_\_\_\_

Defendants, THE CITY OF NEW YORK, WILLIAM DANCHAK, RICHARD E. PIGNATELLI, JAMES E. HALLERAN, EDWARD J. DEIGHAN and MICHAEL E. KNOTT (hereinafter collectively referred to as the "City"), move for an order (1) dismissing Plaintiff's complaint in its entirety against Michael E. Knott; (2) granting them leave to amend their answer to add the affirmative defense of statute of limitations, and upon so doing, dismissing the First and Fourth Causes of Action in Plaintiff's complaint insofar as it asserts state law claims; and (3) dismissing the complaint in its entirety against all Defendants pursuant to CPLR §3211[a][7] and §3212.

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Plaintiff, TARRELL WILLIAMS, solely opposes the City's application to the extent that it seeks summary judgment on his claim for use of excessive force under 42 USC §1983. Thus, to the extent that the City's application for summary judgment is unopposed by Plaintiff, it is hereby GRANTED.

With regards to the City's motion for summary judgment on Plaintiff's claim for use of excessive force under 42 USC §1983 (First Cause of Action), that portion of the City's motion is DENIED.

### ***Background***

On July 31, 2001, Defendant Police Officers, Danchak, Deighan, Halleran and Pignatelli, discharged their service weapons at Plaintiff multiple times resulting in personal injuries. The facts surrounding how Plaintiff came to be shot are in serious dispute.

According to the City, Defendant Police Officers Danchak, Deighan, Halleran and Pignatelli were on a routine, anti-crime plainclothes patrol in an unmarked New York Police Department ("NYPD") vehicle when they received a call of a "dispute" at Greene and Bedford Avenues in Brooklyn, New York (Danchak's EBT, 32-38). As the Police Officers proceeded to the area, driving southbound on Franklin Avenue near Lafayette Avenue, Officer Danchak observed people yelling and running (*Id.* at 41-42) and Officer Deighan observed two crowds of people on both the northwest and southeast corners of Franklin and Lafayette Avenues engaged in a verbal dispute (Deighan's EBT, 30). The NYPD vehicle pulled over to the curb close to the intersection of Franklin and Lafayette Avenues. Thereafter, Police Officers Danchak, Deighan, Halleran and Pignatelli observed Plaintiff separate himself from a group of males located on the southeast side of Franklin and Lafayette Avenues and walk into said intersection holding an object in his right hand (Danchak's EBT, 53). He appeared to be saying something to the crowd and the crowd started running (Deighan's EBT, 34:12-16). Plaintiff came to a stop in front of the NYPD vehicle, at which point he pulled up his right arm and fired the gun into the crowd (Danchak's EBT, 62). By this time, Officer Danchak had exited the vehicle and drew his service weapon (*Id.* at 66), as did Officer Deighan who yelled "police" (Deighan's EBT, 37). Plaintiff then allegedly directed his gun towards the Defendant Police Officers (*Id.*). As a result, Defendant Police Officers discharged their weapons

at Plaintiff.<sup>1</sup> As they were firing their weapons, Plaintiff proceeded to run down Franklin Avenue with the gun still in his hand. Thereafter, Sergeant Danchak and Officer Pignatelli began pursuing Plaintiff on foot while Officers Halleran and Deighan pursued Plaintiff by vehicle. Officer Deighan testified that, while he was pursuing Plaintiff, he kept shouting "Police, don't move" (Deighan's EBT, 45:2:6). When the NYPD vehicle caught up to Plaintiff, Officers Halleran and Deighan again told Plaintiff to drop the gun, however, Plaintiff raised his gun toward the NYPD vehicle and Officers Halleran and Deighan again discharged their weapons at Plaintiff (*Id.* at 44-47; Halleran's EBT, 79-80). Soon thereafter, Plaintiff fell to the ground, still holding the gun, and Officer Pignatelli ran over and slid the gun away with his foot.

An entirely different narrative is set forth by Plaintiff. According to Plaintiff, he and several of his friends were involved in a physical fight with a group of males (Plaintiff's EBT, 60-64). Plaintiff was engaged in two fights at different times. At some point during Plaintiff's fight with the second male, the other male pulled out a black revolver (*Id.* at 64: 15-16). Plaintiff struggled with the other male for the gun, which discharged once while both set of hands were on the gun (*Id.* at 71:18-24). Immediately after the gun discharged, Plaintiff gained control of the gun and the other male ran away (*Id.* at 72:15-20). Plaintiff never came to know the identity of the other male. Afterwards, as Plaintiff was standing at the corner of Franklin and Lafayette Avenues, still holding the gun in his right hand, Plaintiff heard one shot fired, followed by rapid shots in succession (*Id.* at 74:7-20). Plaintiff could not tell where the shots were coming from (*Id.* at 75:22-24). After hearing the first shot, Plaintiff started running southbound on Franklin Avenue toward Clifton Place until his knee "gave out" (*Id.* at 77-78). Plaintiff stopped running, at which point he heard a car come to a screeching halt in front of him (*Id.* at 84:7-10). Plaintiff observed that the car was a dark, four-door sedan with two Caucasian males sitting in the driver and passenger seats (*Id.* at 85-86). Before seeing the car, Plaintiff had dropped the gun on the floor in order to check his knee (*Id.* at 88:4-14). As the vehicle stopped and pulled in front of Plaintiff, Plaintiff put his hands up in the "surrendering" position, inferring that the two male Caucasian individuals were police officers (*Id.* at 87). Almost immediately, multiple shots were fired at him from the NYPD vehicle (*Id.* at 89:5). Plaintiff thereafter fell to the ground and rolled around trying to avoid the bullets (*Id.* at 93:16-19). When the shooting stopped, Plaintiff was lying on his stomach, face down, on the sidewalk, feet toward the police car.

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<sup>1</sup>Officer Pignatelli attempted to discharge his service weapon at Plaintiff but it malfunctioned.

It is Plaintiff's position that he never saw Defendant Police Officers when he entered the intersection; never fired a shot into the crowd or pointed the gun at any crowd; never attempted to fire at Defendant Police Officers; and never heard anyone identify themselves to him as a police officer or yell "drop the gun" (Plaintiff's EBT Testimony, 80).

Defendant Police Officers discharged their service weapons a total of 33 times, hitting Plaintiff in the wrist, hand, butt and foot.

The City Defendants contend that they are entitled to summary judgment on Plaintiff's claim for excessive force on the basis of qualified immunity. Specifically, the City argues that Defendant Police Officers' use of deadly force against Plaintiff was objectively reasonable because they perceived the imminent use of deadly physical force by Plaintiff against them.

#### *Discussion*

"The Fourth Amendment prohibits the use of unreasonable and therefore excessive force by a police officer in the course of effecting an arrest" (*Tracy v Freshwater*, 623 F3d 90, 96 [2d Cir 2010]). "[A]n officer's decision to use deadly force is objectively reasonable only if 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others'" (*Cowan v Breen*, 352 F3d 756, 762 [2d Cir 2003]). For purposes of either Fourth Amendment liability or qualified immunity, the objective reasonableness inquiry for officers using deadly force "depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force" (*Id.*).

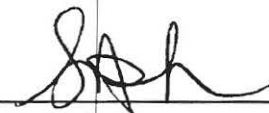
Based on the City's account of events, where Plaintiff discharged the gun into the crowd and thereafter directed the gun at the police officers, the decision to shoot Plaintiff would be objectively reasonable. However, there are issues of fact as to whether Plaintiff shot a round into the crowd and whether he aimed his gun toward the officers. According to Plaintiff, after obtaining the gun, he was standing at the corner of the intersection when, suddenly, shots started firing rapidly around him. Plaintiff testified that he never saw a police officer before hearing shots fired and that nobody identified himself as a police officer or told him to drop his weapon. In addition, Plaintiff testified that the two police officers pursuing him in the NYPD vehicle fired at him *after* he had dropped his gun and assumed the "surrendering" position. Thus, viewing the facts in the light most favorable to Plaintiff, it cannot be said, as a matter of law, that the Defendant Police Officers' use of deadly force against Plaintiff was objectively reasonable (*see Taylor v Nassau County*, 2012 US Dist LEXIS

159106, 11-CV-0934 (SJF)(GRB), \*23-24 [2012]; *Carvajal v Mihalek*, 2009 US Dist LEXIS 115279, 07 Civ. 0170 (PAC), \*15-16 [2009]; *Getlin v Zoll*, 707 F Supp 2d 369, 373 [2010]).

Having determined that, assuming the truth of Plaintiff's allegations, a jury could find in Plaintiff's favor on the question of excessive force, the Court turns to the issue of whether the Defendant Police Offices are entitled to qualified immunity. "The doctrine of qualified immunity shields police officers acting in their official capacity from suits for damages under 42 USC §1983, unless their actions violate clearly-established rights of which an objectively reasonable official would have known" (*Thomas v Roach*, 165 F3d 137, 142 [2d Cir 1999]). "Summary judgment on qualified immunity grounds is not appropriate when there are facts in dispute that are material to a determination of reasonableness" (*Id.* at 143). As set forth above, given the sharply disputed versions of events, summary judgment based on the ground of qualified immunity must be DENIED (*see Getlin v Zoll, supra; Seguinot v Dzenan*, 2013 US Dist LEXIS 45133, 6:10-CV-1387, \*22-23 [NDNY 2013]).

This constitutes the Decision and Order of the Court.

E N T E R,



SYLVIA G. ASH, J.S.C.

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