King v City of New York
2022 NY Slip Op 33488(U)
October 6, 2022
Supreme Court, Kings County
Docket Number: Index No. 504037/13
Judge: Katherine A. Levine
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At an IAS Term, Part 25 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 6th day of October, 2022

P R E S E N T:

HON. KATHERINE A. LEVINE,
Justice.

- -X

GINA KING AND CHIAM LEIZEROVICI,

Plaintiffs,

- against -

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, DET. MICHAEL ZAK, SEVEN ZAK AND JOHN DOES 3-10, THE NAME "DOE" BEING FICTITIOUS AND INTENDED TO REPRESENT NYPD SUPERVISORS WHO HELD PLAINTIFFS IN CUSTODY AT THE 62ND PRECINCT,

Defendants

- -X

D E C I S I O N / O R D E R
Hon. Katherine A. Levine
Index No. 504037/13

The following papers numbered 1 to 8 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4, 5-6
Opposing Affidavits (Affirmations)	7
Reply Affidavits (Affirmations)	8
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants Michael Zak and Steven Zak (collectively defendants or the Zak defendants) move, in motion (mot.) sequence (seq.) two, pursuant to CPLR 3211 and 306 (b), to dismiss the complaint of plaintiffs Gina King and Chiam Leizerovici (collectively plaintiffs). Plaintiffs cross move, in mot. seq. three, to extend their time to serve defendant Steven Zak for good cause and in the interests of justice.[1]

Facts and Procedural History

Plaintiffs commenced the instant action alleging civil rights violations under 42 USC §1983 and state claims for assault, battery, false arrest, excessive force, and municipal liability against the City of New York, the New York City Police Department (NYPD), John Does 1-2 (i.e. defendants), and John Does 3-10 (yet unnamed NYPD supervisors). In their complaint, amended complaint and second amended complaint, plaintiffs essentially allege that on August 14, 2012, they were the victims of a "road rage" incident involving defendant Michael Zak, a then New York City police detective, and his brother, defendant Steven Zak.

Specifically, according to the complaint,[2] "[o]n August 14, 2012, at or about 7:00 p.m., [p]laintiffs were driving in the vicinity of 69th Street and 18th Avenue in Brooklyn, NY, when two male plain clothes police officers ran a red light, nearly hitting [p]laintiffs'

[1]Defendants also argue in their "affirmation & memorandum of law in support of motion to dismiss" (defendants affirmation and memorandum of law) that the complaint should be dismissed pursuant to CPLR 1024 and CPLR 3211 (a) (5). However, based upon the order of this court, dated November 7, 2019, this branch of their motion has been denied.

[2]Filed on or about July 7, 2013 (*infra*).

car" (complaint at ¶ 8).[3] "Plaintiffs did not know the two males were NYPD Officers, and would not learn this until later" (*id.*). The complaint further alleges that "[a]t the next stoplight, the two plain clothes defendants exited their vehicle and confronted [p]laintiffs after [p]laintiffs complained about the defendants' reckless driving" (*id.* at ¶ 9). Thereafter, "[t]he defendants threatened and insulted the [p]laintiffs, and without identifying themselves with the proper identification, told [p]laintiffs they were 'cops' (police)" (*id.*). Subsequently, "[w]hen plaintiffs continued to complain, the defendants physically assaulted Mr. Leizerovici by punching and kicking him multiple times to the head and body" (*id.* at ¶10). While this was taking place, "Ms. King called 911 for police assistance" (*id.* at ¶ 11). The complaint next alleges that "[o]ne of the two plain clothes defendants then punched Ms. King in the right side of her head, causing injury" (*id.* at 12). Then, "[a]fter striking the two plaintiffs, the plain clothes defendants fled the scene" (*id.* at ¶ 13).

The complaint next alleges that "[w]ithin minutes an EMS paramedic van that had been in the area stopped to assist the [p]laintiffs, and treated them for their injuries" (*id.* at ¶ 14). Then, "[s]hortly after EMS arrived, NYPD police cars arrived, and [p]laintiffs explained the events as described herein, and showed the officers the digital photos of the

[3]The second amended complaint differs from the complaint and amended complaint in that it identifies the driver and passenger of the vehicle which nearly hit plaintiffs' vehicle as the Zaks, either collectively or individually, instead of as "two male plain clothes police officers."

plain clothes officers []" (*id.* at ¶ 15).[4] Thereafter, "[t]he responding police officers then took [p]laintiffs to the 62nd Precinct" (*id.*). The complaint further alleges that "[a]t the 62nd precinct, [p]laintiffs' identifications were seized and they were not permitted to leave;" that "[w]hile they met with several police supervisors, they reasonably believed they were detained against their will;" that "[a]t approximately 2:30 a.m. on August 15, 2012, after 7.5 hours in custody, the [p]laintiffs were released [] [and] [n]either was charged with any crime; and that "[n]either [p]laintiff has heard from the 62nd Precinct officers or other investigating officers regarding the assault or the identification of the defendants" (*id*. at ¶¶ 16-18). Plaintiffs' attorney asserts that while plaintiffs were at the 62nd Precinct, they described defendants and provided photographs of them taken during the attack (affirmation in support of plaintiffs' cross motion at p. 8, ¶ 38).

On August 16, 2012, two days after the incident, defendants, plaintiffs, and the three ambulance drivers were involved in an investigation conducted by the NYPD Internal Affairs Bureau (IAB) (plaintiffs' supplemental affirmation opposing defendant Michael Zak's motion to dismiss, exhibit 18).

[4]Plaintiffs indicate in the complaint that the digital photographs are attached to the complaint but the photographs do not appear in the NYSCEF docket for the within action. The amended complaint, filed on or about July 30, 2013, and the second amended complaint, filed on or about November 14, 2017, make the identical allegation, but the photographs are not attached to these pleadings.

On October 16, 2012, plaintiffs filed a notice of claim with the Comptroller's Office regarding the incident.[5]

In an IAB report dated June 11, 2013, the IAB investigation made a finding that Detective Michael Zak had violated NYPD rules when he "failed to remain at the scene of the accident, failed to safeguard his firearm, harassed Ms. Gina King and Chiam Leizerovici, failed to notify IAB of the incident and failed to request the patrol supervisor to the scene" (affirmation in support of plaintiffs' cross motion, exhibit 3).

On or about July 7, 2013, plaintiffs filed a summons and complaint against the City of New York, the NYPD, John Does 1-2 representing the "two plain clothes defendants involved in the false arrest and use of excessive force against" them and John Does 1-3, representing NYPD supervisors at the 62nd Precinct, asserting civil rights claims under 42 USC § 1983, as well as state claims for assault, battery, false arrest, excessive force, and municipal liability against the NYPD and individual NYPD officers.

On July 30, 2013, plaintiffs filed their first amended complaint. The City interposed its answer on or about August 21, 2013. Thereafter, the City conducted 50-h hearings of both p]laintiffs on October 15, 2013 (*id.* at exhibit 1 and exhibit 2). According to plaintiffs' attorney, at the hearings, plaintiffs "provided detailed descriptions and photographs of their attackers (*id.* at p. 2, ¶ 40), although no photographs are annexed to the exhibits containing the hearing transcripts.

[5]The notice of claim does not appear in the NYSCEF docket for the within action.

On August 11, 2014, plaintiffs served their demands for information identifying the names of all "John Does" including "John Doe 1" and "John Doe 2." That day, a preliminary conference was held. As a result, by order dated August 11, 2014, the court directed defendants to provide "the names and addresses of any witnesses to the occurrence and notice witnesses (including plaintiff); accident reports; party statements; photographs taken in the ordinary course of business, and/or to be presented at trial, within 90 days." The City was also required to provide, within 90 days, the Complaint Report; Complaint Follow Up Report(s); Arrest Report, Memo Book entries for the incident in question; On-line Booking Sheet, and Copies of the applicable section(s) of the Patrol Guide relating to Use of Force and Law of Arrest.

Defendants did not comply with the August 11, 2014 PC order, and thus failed to provide any information to identify the "John Doe" parties.

On March 10, 2015, a compliance conference was held after which the court, by order of the same date, directed the City to exchange "CCRB and IAB reports for the subject incident" on or before May 10, 2015.

On June 10, 2015, plaintiffs sent a letter to defendants demanding the names of "John Does 1-2."

On June 30, 2015, a compliance conference was held but plaintiffs failed to appear, causing the action to be marked off the calender.

On April 8, 2016, defendants produced the IAB records, which contained the names of "John Does 1-2" in the complaint, namely Michael Zak and Steven Zak.

One year later, on April 7, 2017, plaintiffs moved to restore the action to the calendar and for leave to file the second amended complaint to add the individually identified defendants Michael Zak and Steven Zak, previously known as "John Doe 1" and "John Doe 2." Plaintiffs' motion was granted by order dated October 13, 2017. Plaintiffs were directed to serve the supplemental summons and second amended complaint within 45 days.

On November 14, 2017, plaintiffs *filed* the supplemental summons and second amended complaint, which now named Michael Zak and Steven Zak as defendants. That same day, the court ordered the City to respond to plaintiffs' August 11, 2014 demand for defendants' last known addresses within 45 days and extended plaintiffs' time to serve the supplemental summons and second amended complaint on the Zaks within thirty days after receipt of their addresses from the City.

On January 12, 2018, the City provided an address for Steven Zak (402 Bay Ridge Parkway, Brooklyn, New York) but did not provide his apartment number. According to plaintiffs' attorney, plaintiffs were able to obtain Steven's apartment number in late February, 2018 after a "diligent search" using the partial address provided by the City (affirmation in support of plaintiffs' cross motion at p. 6 at ¶ 29).

Thereafter, plaintiffs made three attempts of personal service on Steven Zak - the first on February 22, 2018, at 7:15 p.m, the second on March 2, 2018, at 4:49 p.m., and the third on March 13, 2018 at 7:05 a.m. Unable to complete personal service, plaintiffs served Steven Zak on March 13, 2018 via affix and mail service at 402 Bay Ridge Parkway, Apt. 56, Brooklyn, NY 11209.

On April 12, 2018, the City provided disclosure containing the last known address for Michael Zak (968 Windrome Drive, Nashville, TN 37205). Plaintiffs personally served Michael Zak at the address provided on April 19, 2018 within 30 days of the time the information was provided, as per the court's November 14, 2017 order.

By order dated November 7, 2019, after oral argument, this court decided defendants' motion and plaintiffs' cross motion to the extent of dismissing plaintiffs' § 1983 claims against defendant Steven Zak with prejudice, denying that branch of defendants' motion to dismiss plaintiffs' state law claims, and finding service as to defendant Michael Zak proper. The court further held that it would consider: 1) whether defendant Steven Zak was properly served, 2) plaintiffs' cross motion to extend their time to serve Steven Zak upon submission of additional proof submitted by plaintiffs; and that branch of defendants' motion to dismiss plaintiffs' § 1983 claim as to Michael Zak.

Discussion

Defendants move to dismiss the complaint on the grounds that plaintiffs failed to make a diligent effort to identify the "John Doe" defendants before the statute of

limitations on plaintiffs' causes of action had run, in violation of CPLR 2014; that even after obtaining defendants' names, plaintiffs failed to timely file an amended complaint; that Steven Zaks has never been served, warranting dismissal of the complaint as to him; that the time within which to serve him has long expired; that Michael Zak was served after the statute of limitations in which to serve him expired; and that the § 1983 claims against both defendants are not cognizable - as to Michael Zak because he was not acting under "color of law," and as to Steven Zak because he was never a police officer.

Plaintiffs cross move for an order to serve Steven Zak for good cause and in the interest of justice.

As noted above, by virtue of the court's order dated November 7, 2019 (which in part, denied that branch of defendants' motion to dismiss plaintiffs' state law claims, and found service as to defendant Michael Zak proper), that branch of defendants' motion to dismiss the complaint pursuant to CPLR 1024 has been denied. Further, also based on that same order, that branch of the motion to dismiss the § 1983 claim as to Steven Zak has been granted.

With respect to plaintiffs' cross motion to extend their time to serve Steven Zak, defendants argue that Steven has not been served and that therefore the complaint against him must be dismissed. In this regard, defendants contend that plaintiffs did not serve Steven at his current address; that they failed to exercise due to diligence in attempting to serve Steven according to CPLR 308 (1) and (2) before serving him via affix and mail

pursuant to CPLR 308 (4); and that since plaintiffs served Steven on March 13, 2018, they failed to serve him within 120 days after they filed the second amended complaint on November 14, 2017, or within 45 days of the court's October 3, 2017 order.

In opposition to defendants' motion and in support of their own cross motion, plaintiffs contend that their time to serve Steven should be extended upon good cause shown and in the interest of justice pursuant to CPLR 306-b. With respect to their argument that their time to serve Steven should be extended based upon a showing of good cause, plaintiffs argue that they "timely served" Steven at the address provided by the City pursuant to the court's November 21, 2017 order. Specifically, plaintiffs point out, and the record reveals, that on January 12, 2018, the City provided an address for Steven but did not provide his apartment number; that on February 7, 2018, plaintiffs emailed the City asking for Steven's apartment number; that "[t]hrough other search methods," plaintiffs obtained the apartment number; and that after making three attempts at personal service, they served Steven via affix and mail on March 18, 2018. Although plaintiffs failed to serve Steven within 30 days after receiving Steven's address on January 12, 2018, they contend that "[s]ince the City never provided Steven Zak's full address, [their] time to serve Steven [] pursuant to this [c]ourt's November [14] 2017 [o]rder never began to run." In this regard, plaintiffs assert that they "were unable to locate Steven Zak by any means prior to receiving a partial address from the City and . . .

had no reason to know that Steven Zak no longer lived at the address that the City provided."

Even assuming that plaintiffs failed to establish good cause, they argue that an extension would still be warranted in the interest of justice. In this regard, they assert that when this action was commenced, they did not know the names of the Zak defendants; that this information was exclusively in the City's control; that the City repeatedly refused to provide this information until April, 2016; that thereafter "there was additional delay" while the City was deciding whether to represent the Zak defendants; and that the City finally provided a partial last known address for Steven Zak on January 12, 2018, whereupon they "immediately" began searching for Steven's apartment number, asked the City for it on February 7, 2018, obtained the apartment number in late February, 2018, and served Steven on March 13, 2018, after three attempts at personal service (February 22, 2018, at 7:15 p.m, March 2, 2018, at 4:49 p.m., and March 13, 2018 at 7:05 a.m). Unable to complete personal service, plaintiffs served Steven via affix and mail service on March 13, 2018 at 402 Bay Ridge Parkway, Apt. 56, Brooklyn NY, 11209.

CPLR 306-b provides that:

> "Service of the summons and complaint . . . shall be made within one hundred twenty days after the commencement of the action or proceeding . . . If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."

"Good cause requires the plaintiff to demonstrate, as a threshold matter, reasonably diligent efforts[] in attempting to effect service" (*HSBC Bank, USA v Gibatov*, __ AD3d _ , 2020 NY Slip Op 02603, *2 [2d Dept 2020] [internal citations and quotation marks omitted]). In particular, "[g]ood cause will not exist where a plaintiff fails to make any effort at service . . . or fails to make at least a reasonably diligent effort at service" (*State of New York Mtge. Agency v Braun*, 182 AD3d 63, 66 [2d Dept 2020] [internal citations and quotation marks omitted]). "By contrast, good cause may be found to exist where the plaintiff's failure to timely serve process is a result of circumstances beyond the plaintiff's control" (*id.* [internal citations and quotation marks omitted]).

On the other hand, with respect to the interest of justice standard, "[u]nlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter" (*id.*). Specifically, "[t]he interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties" (*Leader,* 97 NY2d at 105-106). In this regard, "the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (*id.;see also HSBC Bank, USA*, 2020 NY Slip Op 02603, *2 [2d Dept 2020]). Accordingly, "the more flexible interest of justice[] standard accommodates late service

that might be due to mistake, confusion, or oversight, so long as there is no prejudice to the defendant" (*id.*).

"Service pursuant to CPLR 308(4), known as 'affix and mail' service, may be used only where service under CPLR 308 (1) or 308 (2) cannot be made with due diligence" (*Mid-Island Mtge. Corp. v Drapal*, 175 AD3d 1289, 1289-1290 [2d Dept 2019] [internal citations and quotation marks omitted]). In this regard, "[w]hile the precise manner in which due diligence is to be accomplished is not rigidly prescribed, the requirement that due diligence be exercised must be strictly observed, given the reduced likelihood that a summons served pursuant to [CPLR 308 (4)] will be received" (*id.* [internal citations and quotation marks omitted]). Further, "[a] mere showing of several attempts at service at either a defendant's residence or place of business may not satisfy the 'due diligence' requirement before resort to affix and mail service" (*id.*). In contrast, "[d]ue diligence may be satisfied with a few visits on different occasions and at different times to the defendant's residence or place of business when the defendant could reasonably be expected to be found at such location at those times" (*id.*, internal citations and quotation marks omitted]).

Finally, "[w]here service is effected pursuant to CPLR 308 (4), the affix and mail method, the plaintiff must demonstrate that the summons was affixed to the door of the dwelling place or usual place of abode of the person to be served and mailed to such person's last known residence" (*Deutsche Bank Natl. Trust Co. v O'King*, 148 AD3d 776,

777 [2d Dept 2017], citing CPLR 308 [4]). In this regard, "[t]he 'dwelling place' is one at which the defendant is actually residing at the time of delivery" (*id.*). "The 'usual place of abode' is a place at which the defendant lives with a degree of permanence and stability and to which he intends to return" (*id.*).

Here, plaintiffs have failed to establish that they exercised reasonably diligent efforts in attempting to effect proper service of process upon Steven Zak and, thus, have failed to show "good cause" for an extension. As an initial matter, as Steven avers in his affidavit, he has "never been served with a copy of the [s]ummons and [c]omplaint in this matter, either personally or through the mail." In this regard, Steven states in his affidavit that he does not live at the address listed on the affidavit of service, nor has he lived there for approximately five years. Specifically, Steven asserts that he has resided in two locations in the five years since he lived at the address listed in the affidavit of service, and that he has lived at his present address since March, 2015. As defendants argue, plaintiffs have failed to establish that they made an even cursory Google search of Steven's name so as to confirm that the City gave them Steven's current address. As defendants have established, such a search reveals several websites with Steven's current address (defendants' affirmation and memorandum of law, exhibit D). Further, as noted above, plaintiffs were in possession of Michael Zak's license plate number from the date of the incident, yet failed to make an attempt to search this plate number in order to obtain further information which, in this case, would likely have led them to Steven's "dwelling

place." Thus, no real attempt was made to "effectuate service ... at the defendant's actual 'dwelling place or usual place of abode'" (*JPMorgan Chase Bank, N.A. v Iancu Pizza, Ltd.*, 78 AD3d 902, 903 [2d Dept 2010]), nor is there any evidence that "the process server ma[d]e genuine inquiries to ascertain the defendant's actual residence . . ." (*Prudence v Wright*, 94 AD3d 1073, 1074 [2d Dept 2012]).

In any event, even assuming plaintiffs reasonably relied upon the address provided by the City, plaintiffs failed to serve Steven within 30 days of receiving his address, pursuant to this court's November 14, 2017 order. As noted above, while plaintiffs received Steven's address on January 12, 2018, they waited until February 7, 2018, almost one month, before asking the City for the apartment number, and rather than conducting their own independent search. By the time they obtained the apartment number via their own efforts in "late February, 2018," it was too late to make timely service. Thus, the court rejects plaintiffs' claim that their time to serve Steven never began to run because the City never provided Steven's apartment number.

Moreover, due diligence was not exercised because two of the three attempts to serve Steven by the process server were made "on weekdays during normal business hours or when it could reasonably have been expected that he was in transit to or from work" (*Earle v Valente*, 302 AD2d 353, 353-354 [2d Dept 2003]; *see also County of Nassau v Long*, 35 AD3d 787, 787-788 [2d Dept 2006]; *O'Connell v Post*, 27 AD3d 630, 631 [2d Dept 2006]; *Annis v Long*, 298 AD2d 340, 341 [2d Dept 2002]; *Austin v*

Tri-County Mem. Hosp., 39 AD3d 1223, 1224 [4th Dept 2007]). Further, [t]he process server made no attempt to determine [Steven's] business address and to effectuate personal service at that location pursuant to CPLR 308 (1) and (2)" (*Earle,* 302 AD2d at 353-354). Thus, under the circumstances, the attempted service of the summons and complaint pursuant to CPLR 308 (4) was defective as a matter of law (*id.*).

However, plaintiffs' cross motion for an extension of time to serve the summons and complaint on Steven should be granted in the interest of justice. On the one hand, "[t]he extension afforded by CPLR 306-b is applicable where . . . service is timely made within the 120-day period but is subsequently found to have been defective" (*Earle*, 302 A2d at 353-354). Here, plaintiffs never served Steven and thus failed to serve him within the 120-day period after filing the second amended complaint on November 14, 2017. Further, defendants did not have actual notice of this action within 120 days after its commencement (*compare Estate of Fernandez v Wyckoff Hgts Med. Ctr.*, 162 AD3d 742, 744 [2d Dept 2018]). In addition, plaintiffs did not exercise due diligence in serving Steven (*id.*). Also, plaintiffs did not seek an extension until after defendants moved to dismiss the complaint (*Chandler v Osadln, Inc*., 181 AD3d 897, *4 [2d Dept 2020]). On the other hand, the action was timely commenced, the statute of limitations for all of plaintiffs' causes of action had expired when plaintiffs moved for this relief, there appears to be no identifiable prejudice to Steven attributable to the delay in proper service, and the complaint, based upon the IAB investigation and the 50-h hearing, appears to be

potentially meritorious (*US Bank N.A v Saintus*, 153 AD3d 1380, 1381-1382 [2d Dept 2017]; *Estate of Fernandez,* 162 AD3d at 744). Accordingly, plaintiffs' cross motion to extend the time to serve the supplemental summons and second amended complaint is granted.

Finally, that branch of defendants' motion to dismiss the §1983 cause of action as to Michael Zak is denied.

> "Section 1983 creates a civil cause of action against a party 'who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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'" (*Claudio v Sawyer*, 675 F Supp 2d 403, 407 [SD NY 2009], *affd* 409 Fed Appx 464 [2d Cir 2011], quoting 42 USC § 1983).

Furthermore,

> "[i]n order to maintain an action under 42 USC § 1983, two essential elements must be present: (1) the conduct complained of must have been committed by a person acting under color of state law; and (2) the conduct complained of must have deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States" (*Everett v Eastchester Police Dept.,* 157 AD3d 658, 659 [2d Dept 2018]).

With respect to off-duty police officers, "'[c]ourts have had frequent occasion to interpret the term "color of law" for the purposes of section 1983 actions, and it is by now axiomatic that under "color" of law means under "pretense" of law and that "acts of officers in the ambit of their personal pursuits are plainly excluded"'" (*Claudio,* 675 F Supp 2d at 407-408 [SD NY 2009], *affd* 409 Fed Appx 464 [2d Cir 2011], quoting

Pitchell v Callan, 13 F3d 545, 548 [2d Cir 1994], quoting 42 USC § 1983). In this regard, "[t]here is no bright line test for distinguishing 'personal pursuits' from activities taken under [']color of law'" (*id.* at 408 [SD NY 2009], *affd* 409 Fed Appx 464 [2d Cir 2011], quoting *Pitchell,* 13 F3d at 548). "[T]he relevant question in deciding color of law is not whether the officer 'was on or off duty when the challenged incident occurred,' but whether the officer 'albeit off-duty, nonetheless invokes the real or apparent power of the police department' or 'perform[s] duties prescribed generally for police officers'" (*id.*, quoting *Pitchell,* 13 F3d at 548). Accordingly, a police officer is not acting under color of law when his actions are not "committed in the performance of any actual or pretended duty . . . but were performed in the ambit of (his) personal pursuits" (*Bonsignore v City of New York*, 683 F2d 635, 638-639 [2d Cir 1982] [internal citations and quotation marks omitted]).

> "Factors to be considered when determining whether an off-duty police officer acted under color of law include 'whether defendants identified themselves as police officers at any time during the incident; if plaintiff was aware that the defendants were police officers; whether defendants detained or questioned the plaintiff in the line of duty or scope of employment as police officers; if defendants drew a firearm or arrested the plaintiff; whether defendants were engaged in any investigation or any aspect of the traditional public safety functions of police work'" (*Claudio*, 675 F Supp 2d at 408 [SD NY 2009], *affd* 409 Fed Appx 464 [2d Cir 2011], quoting *Wahhab v City of New York*, 386 FSupp 2d 277, 288 [SD NY 2005]).

Courts "look at the totality of the circumstances surrounding the officer's acts, with attention to the nature of the officer's acts (rather than simply the officer's duty status) and the relationship of that conduct to the officer's official duties" (*id., affd* 409 Fed Appx 464 [2d Cir 2011] [internal citations and quotation marks omitted]). A complaint alleging gratuitous or excessive use of force by a police officer states a cause of action under the statute against that officer (*Delgado v City of New York,* 86 AD3d 502, 511 [1st Dept 2011], citing *Hodges v Stanley,* 712 F2d 34, 35 [2d Cir 1983]). On the other hand, such claim is subject to dismissal where "no Federally protected right was clearly" alleged (*Dipalma v Phelan*, 81 NY2d 754, 756 [2d Dept 1992]).

"When a party moves pursuant to CPLR 3211(a) (7) to dismiss an action, the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (*Porat v Rybina*, 177 AD3d 632, 633-634 [2d Dept 2019]). Accordingly," [i]n deciding the motion, the court must accept the facts as alleged by the plaintiff as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.*). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). Moreover, the courts liberally construe the complaint, and accept as true the facts alleged in the complaint and *any submissions in opposition to the dismissal motion"* (*id.*, citing

Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 414 [2001], *see also Wieder v Skala*, 80 NY2d 628, 631 [1992]) (emphasis added).

Defendants claim that the allegations of the complaint that Michael Zak was "acting under color of state law" or "in his capacity as a Police Officer" fail to set forth facts to render these claims cognizable. In particular, defendants contend that the incident described in the second amended complaint clearly reflects an argument among private citizens and has no relation to Michael Zak's alleged employment as a NYPD detective. Further, defendants contend that Mr. Leizerovici's account of the incident describes a private dispute between two individuals unrelated to Michael's Zak's employment as a police officer.

However, contrary to their claims, the complaint, the amended complaint, and the second amended complaint, as well as the evidence submitted by plaintiffs in opposition to defendants' motion, sets forth a cognizable claim under § 1983.[6]

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[6]Despite defendants' reliance upon federal standards in analyzing their motion to dismiss, "it is well settled that . . . this State's courts have consistently applied the standards promulgated by New York State case law when confronted with a motion seeking dismissal of a cause of action pursuant to 42 USC § 1983, on grounds that the complaint fails to state a cause of action" (*Brown v City of New York,* NYLJ, Sep 25, 2017 at 24, 2017 NYLJ LEXIS 2704, *36 [Sup Ct, Bronx County 2017], citing *Vargas v City of New York*, 105 AD3d 834, 834-837 [2d Dept 2013], *lv to appeal granted* 22 NY3d 858 [2013] [In granting defendants' motion seeking to dismiss plaintiff's claim pursuant to 42 USC §1983 for failure to state a cause of action, the court applied the standards promulgated by CPLR §3211(a) (7) and the case law interpreting it]; *see also Nasca v Sgro*, 101 AD3d 963, 963-965 [2d Dept 2012] [same].

First, with respect to whether a right under the United States Constitution or laws of the United States were violated, the complaint sufficiently alleges that plaintiffs' Fourth and Fourteenth amendment rights were violated when Michael Zak used excessive force in attacking plaintiffs during the incident (*see generally Owens v City of New York*, 183 AD3d 903, [2d Dept 2020] [(C)laims that law enforcement . . . used excessive force . . . [are] analyzed under the Fourth Amendment and its . . . standard [of objective reasonableness"]; *Combs v City of New York*, 130 AD3d 862, 864-865 [2d Dept 2015]; *see also Brown v City of N.Y.,* 40 Misc 3d 1206 [A], 2009 NY Slip Op 52857 [U], *17-18 [Sup Ct, Kings County 2009] ["the Fourteenth Amendment's guarantee of substantive due process protects individuals from excessive force utilized by police officers outside the context of an arrest"]).

Next, with respect to whether Michael Zak was acting "under color of law," the complaints and evidence sufficiently demonstrate that he was "invok[ing] the real or apparent power of the police department" (*Claudio*, 675 Fsupp 2d at 408 [SD NY 2009], *affd* 409 Fed Appx 464 [2d Cir 2011]). In this regard, although, as defendants argue, the complaint alleges that "[p]laintiffs did not know the two males [involved in the incident] were NYPD Officers, and would not learn this until later," the complaint thereafter alleges that the two males "without identifying themselves with the proper identification, *told [p]laintiffs they were 'cops' (police)*" (emphasis added).

Further, the August 15, 2012 IAB report indicates that Mr. Leizerovici stated that "he was travelling on 18th Avenue with his girlfriend Ms. Gina King and was stopped at the intersection waiting for an ambulance to pass through the intersection at 47th Street." He further reported that "he had the green light and the ambulance had the red light but had emergency lights and sirens on;" that "[a]s the ambulance passed he was about to make a right turn onto 47th Street when a car came across the intersection at a high rate of speed, following the ambulance, and nearly struck their car;" that the male in the passenger seat put up his middle finger to him, which caused him to be very angry;" and that "he immediately followed the other car, intending only to let him know that he nearly caused an accident" (plaintiffs' supplemental affirmation in opposition to defendant Michael Zak's motion to dismiss § 1983 cause of action, exhibit 18).

He further stated that "he followed the other car for approximately [three]blocks;" that when he and Ms. King "were stopped at a red light, the driver and the passenger of the other car got out and started being verbally abusive towards him;" and that he then "also got out of his car and started to argue with the other driver." Mr. Leizerovici further stated that "the *driver identified himself as a police officer*, but he did not believe that he was, and asked for him to show him his shield" (emphasis added). Thereafter, "*[t]he other driver retrieved his shield from his car and told [Mr. Leizerovici that] he was going to get in trouble if he didn't return to his car*" (emphasis added). Mr. Leizerovici further stated that "the driver stuck his finger in his face and punched him in the face and then

[he] punched the driver back;" that "Ms. King attempted to intervene and was also struck;" and that "the passenger then tried to kick Ms. King, but Mr. Leiverovici managed to grab his leg and throw him to the ground." Thereafter, according to Mr. Leizerovici, "[a]n ambulance pulled up and asked what was going on, *and the driver identified himself to the ambulance crew as a cop*" (emphasis added). The report further indicates that "Mr. Leizerovici stated he told Ms. King to call 911, and the other driver and his passenger then returned to their car and left;" that "[h]e and Ms. King waited at the scene for the police to arrive;" that Mr. Leizerovici stated that he [was] not injured;" and that "Mr. Leizerovici stated that he has had several similar traffic disputes in the past, w[h]ere he attempted to talk to other motorists (*id.*).

Ms. King reported the incident similarly. According to the IAB report, Ms. King stated that:

> "after the initial near accident, both her boyfriend, Mr. Leizerovici, and the other driver were cursing and yelling at each other as they drove on 17th Avenue. When they were stopped at the red light the *other driver exited his vehicle and identified himself as a police officer and told Mr. Leizerovici to return to his car*. Mr. Leizerovici demanded to see a shield, *so the driver returned to his car and retrieved a shield, which he quickly displayed*. The driver became verbally abusive, then pushed her boyfriend, Chaim, and then immediately struck Chaim with the heel of his palm in the mouth and punched him in the face. [Ms. King] stated that Chaim punched the officer back, and as Chaim backed away both the driver and the passenger attempted to attack him. She stated that she attempted to stop the driver from striking Chaim, and he grabbed her by the hair and pulled, then struck

> her. After the fight ended she called 911. Ms. King stated she was not injured (emphasis added)" (*id.*).

The volunteer ambulance driver and his two coworkers reported that a white male at the scene identified himself to them as a police officer. Specifically, the driver reported that "a white male identified himself to me as an MOS [Member of Service] verbally . . . then went to his vehicle and left the scene." The second ambulance worker reported that "[a] white male identified himself as a police officer to [me] and then left in his vehicle." The third ambulance worker reported that "[a] white male came up to him and showed him a shield and identification card. He stated that he was a MOS and [that] 'nobody was hurt' and [that] 'everything is ok'" (*id.*).

Detective Zak's description of the incident which he provided at the August 12, 2012 IAB investigation mirrored the description provided by Mr. Leizerovici and Ms. King, to the extent relevant here. Specifically, he reported that:

> "he was travelling on 47th Street and was following an ambulance that had its lights and sirens. After he crossed 18th Avenue he noticed a vehicle begin to follow him. He stated that the vehicle was trying to pass him on the passenger side several times, but couldn't. When they reached 17th Avenue and 64th Street he was stopped at a red light he saw the driver throw something and heard an object strike his vehicle. He exited the vehicle and went back to the driver of the other vehicle. The other driver got out and was yelling at him. *The officer was asked to produce his identification, which he did by showing his shield.* Then Mr. Leizerovici poked him in the chest with his finger. He poked the driver back and then the driver took a swing at him, but missed and he took a swing at the driver but also missed. He then saw the female passenger get in between them and also saw his

> brother get on the ground. As the dispute ended an ambulance crew showed up and *he identified himself as a police officer, and told them that the incident was over and no one was hurt*. He then returned to his car with his brother and went home. Later he realized that he needed to report the incident, and started to return to the 62nd Precinct. His command called him and stated that the Desk Officer of the 62nd Precinct was requesting him so he called the desk officer and informed him that he was on his way there" (emphasis added) (*id.*).

Steven Zak reported that:

> "he was the front seat passenger in his brother's vehicle and his brother was the operator of the vehicle. At approximately 1845 hours along 17th Avenue somewhere on the 50's he did observe a vehicle following his brother's vehicle. He stated that he gave the other driver the middle finger which likely caused the other driver to be angry. This vehicle attempted to pass them and get along side them numerous times and was driving erratically. At the corner of 17th Avenue and 64th street he and his brother exited their vehicle to see what the guy's problem was. As they walked back to the vehicle a male and female exited the vehicle and began to yell at them. *Mr. Zak saw his brother identify himself as a police officer, and retrieved his shield from his car*. He stated that the other driver said that he didn't care and then saw him take a swing at his brother. He never saw his brother strike the other motorist. He attempted to kick at the other driver to separate the parties but the other driver grabbed his leg and pulled him to the ground. He then left the scene and returned home" (emphasis added) (*id.*).[7]

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[7]The IAB interviewed Ms. King again on October 19, 2012. The report indicates that Ms. King stated that the subject officer (Michael Zak) identified himself as a police officer before striking Mr. Leizerovici; *that Michael Zak again identified himself as a police officer in a back and forth discussion with Mr. Leizerovici, after which Steven Zak retrieved Michael's ID from his vehicle and handed it to Michael*; *that after the ambulance arrived, Michael asked her and Mr. Leizerovici "[w]hat do you want to do about this" to which Ms. King replied, "It's your job on the line," to which Michael responded "[n]ot my job on the line*" and then drove away. The

Mr. Leizerovici's testimony at his 50-h hearing in effect mirrored the statements he gave during the IAB investigation. In particular, Mr. Leizerovici confirmed that Michael Zak identified himself as a police officer (affirmation in support of plaintiffs' cross motion, exhibit 1 at 25), that when Mr. Leizerovici asked for proof, Michael directed Steven Zak to get his gun and badge from his car (*id.* at 26); that Michael ultimately retrieved them (*id*); that Michael returned with what looked like an ID and briefly flashed it (*id.* at 27); and that after Michael and Steven punched and kicked Mr. Leizerovici , Michael then told plaintiffs to get back in their car (*id.* at 37).

Mr. Leizerovici also confirmed that the ambulance workers spoke with Michael, who "identified himself verbally as a police officer without identification" (*id.* at 40)

IAB interviewed Mr. Leizerovici again on October 26, 2012. The report indicates that *Mr. Leizerovici stated that during the altercation with the subject officer (Michael Zak), Michael Zak identified himself as a police officer*; *that Michael asked Steven to retrieve his ID and firearm*; that Steven could not find it *so Michael retrieved a wallet which he flashed*; that as the ambulance arrived, *Michael asked Mr. Leizerovici and Ms. King "what are we going to do about this" to which Ms. King stated, "what do you mean? It's your job on the line," to which Michael replied "not my job*." The IAB interviewed Michael Zak again on November 17, 2012. The report indicates that *Michael stated that he had identified himself as a police officer during the altercation but could not remember at which point of the altercation he identified himself*. All parties to the altercation were again interviewed by the IAB on June 11, 2013. The report indicates *that Mr. Leizerovici stated that when the two vehicles involved in the altercation stopped, the subject officer (Michael Zak) stated "[g]et back in your car, I'm a cop, get back in;" that Michael, at Mr. Leizerovici's request, showed him his shield; that Michael yelled at Mr. Leizerovici stating "[y]ou get in your car and do what I tell you to do;" and that when the ambulance arrived, Michael identified himself as a police officer to the ambulance drivers/workers*. Ms. King stated that Michael exited his vehicle, and then hit and punched Mr. Leizerovici. *One ambulance attendant said Michael told him "I'm on the job, nobody is hurt and everything is ok*" (*id.,* exhibit 19) (emphasis added).

At her own 50-h hearing, Ms King confirmed what she had reported during the IAB investigation, namely that the driver of the other vehicle identified himself as a police officer (affirmation in support of plaintiffs' cross motion, exhibit 2 at 33), after which Mr. Leizerovici asked the driver of the vehicle for identification (*id.* at 34); that the driver asked the passenger of his vehicle to get his gun and badge from the back seat (*id.* at 35); that the driver went back to the car and then flashed something very quickly that looked like a wallet and closed it and put it away (*id.* at 37); and that when the ambulance arrived, the driver patted the passenger EMT worker on the back and said "don't worry about it," and then walked back to his vehicle (*id.* at 45-46).

In summary, Michael Zak identified himself as a police officer. Then, in response to Mr. Leizerovici's request, he instructed Steven to retrieve his gun and badge. After showing his badge to Mr. Leizerovici, according to Mr. Leizerovici's IAB statement, Michael then commanded plaintiffs to return to their car, threatening them that they would be in trouble if they failed to comply. Thereafter, Michael and Steven began to punch and kick Mr. Leizerovici. Finally, when the ambulance arrived, Michael identified himself as a police officer, telling the ambulance workers that no one was hurt, that everything was "ok" and that "I'm on the job, nobody is hurt and everything is ok." Further, Michael asked plaintiffs what they wanted to do about the situation, suggesting they may have wanted to file a formal complaint.

Thus, the complaint and the evidence submitted by plaintiffs is sufficient to show that Michael Zak had invoked the apparent power of the police department or performed duties prescribed generally for police officers, and that he was therefore acting under color of law to sustain plaintiffs' 1983 claim, namely he exercised control of plaintiffs and the situation by identifying himself as a police officer, directing plaintiffs back into their car, displaying his badge, and identifying himself as a police officer to the ambulance drivers and telling them everything was under control and that no one was hurt, suggesting he was engaged in an investigation of the incident or was involved in "the traditional public safety functions of police work" (*Claudio*, 675 F Supp 2d at 408 [SD NY 2009], *affd* 409 Fed Appx 464 [2d Cir 2011], quoting *Wahhab,* 386 FSupp 2d at 288). Accordingly, at this early CPLR 3211 (a) (7) stage of the proceedings, the complaint sufficiently states a cognizable §1983 civil rights claim.

The City's reliance upon and *Cooper v City of New York* (2018 WL 4762248, 2018 US Dist LEXIS 170197 [ED NY Sept. 29, 2018, No. 17-CV-1517 (NGG/RLM)]) is misplaced. In that case, three off-duty police officers and a citizen struck the plaintiff's vehicle, the plaintiff fled, and the police officers chased the plaintiff and then assaulted him. The court granted the motion of all these individual defendants to dismiss the §1983 excessive force claim on the grounds that "[w]hile Plaintiff does allege that he felt Jacobs (one of the officers involved) holding a firearm during the altercation, he does not allege any facts to suggest that this made Plaintiff believe Jacobs was officer;" that plaintiff had

alleged that "Jacobs concealed the fact that he [was] a law enforcement officer and did not display anything that could identify him as a law enforcement officer;" that plaintiff further stated that "he was not aware that Jacobs was a police officer until he witnessed Jacobs display a badge and heard him say to the responding officer, 'I'm on the job;'" and, as plaintiffs here concede, that "[a]t no point during the altercation, therefore, does [p]laintiff allege that Jacobs (1) was on-duty at the time of the altercation; (2) identified himself as an officer of the law; (3) wore a uniform or carried handcuffs; (4) revealed a police badge; or (5) placed plaintiff under arrest or otherwise detained him" (*id.*) (*Cooper,* 2018 WL 4762248, *7, 2018 US Dist LEXIS 170197**,** *18 [ED NY Sept. 29, 2018, No. 17-CV-1517 (NGG/RLM)]). Thus, *Cooper* is distinguisable from this case.

The City's reliance upon *Perez v City of New York* (1996 WL 103836, 1996 US Dist LEXIS 2812 [SD NY Mar. 8, 1996, No. 94-CIV- 2061 (DLC)]); *Turk v McCarthy* (661 F Supp 1526 [ED NY 1987]), and *Stavitz v New York* (98 AD2D 529 [1st Dept 1984]), is "telling" because these cases decided the "color of law question in favor of the City at the summary judgment stage or later" (*Abdelaziz v City of New York,* 2016 WL 1465355, *2-3, 2016 US Dist LEXIS 50332, *6 [ED NY 2016, April 14, 2016, No. 13-CV-7268 (SJ/(VMS)]). Further, the City repeatedly cites the proposition that "the act of identifying oneself as a police officer, producing a shield, and executing an arrest, because one's employment with the City confers the authority to do so, does not automatically create liability for the City" (*Perez,* 1996 WL 103836, *2-3, 1996 US Dist

LEXIS 2812, *5-7 [SD NY Mar. 8, 1996, No. 94-CIV-2061 (DLC)]). However, this principle merely reflects the need to base a "color of law"determination on various factors (*Claudio*, 675 F Supp 2d at 408, quoting *Wahhab v City of New York*, 386 FSupp 2d 277, 288 [SD NY 2005]). In any event, the court in *Perez* found that there was an issue of fact as to whether the police officer, in arresting a cab driver for assaulting his family, acted under color of law. Moreover, "t]he fact that a police officer uses, or abuses, his authority may be relevant in deciding whether he was acting under color of state law" (*Mahmood v City of New York*, 2003 WL 21047728, *3, 2003 US Dist LEXIS 7754, *11 [SD NY May 8, 2003, No. 01-CIV- 5899 (SAS0)]).

With respect to *Turk*, that court held that "New York case law makes clear that a police officer's arrest of a citizen does not provide a basis for governmental liability where the arrest stems from a purely personal dispute rather than constituting an action taken in furtherance of the officer's duties as a member of the police force" (*Turk*, 661 F Supp at 1536). However, in *Turk,* the police officer (McCarthy) who shot a security guard at an amusement park (Turk) "was not at the amusement park for any official police purpose, but rather for his own recreation while he was off-duty," "the altercation between Turk and the police officer [McCarthy] arose out of McCarthy's attempt to drink beer on the amusement park grounds," and "McCarthy's identification of himself as a police office was manifestly designed as a means of trying to obtain special treatment from the security guards and can in no way be properly interpreted as an action designed

to further the interests of the NYPD" (*id.*). Thus, *Turk* is readily distinguisable from the facts of this case.

Finally, in *Stavitz*, the police officer, off-duty and in plain clothes, entered the home of his neighbor, with whom he had a prior history of animosity, and then assaulted and arrested two of the neighbors almost immediately after one of the neighbors had told the officer that his construction involving dirt and other material would not affect the officer's property (*Stavitz,* 98 AD2d at 530). The officer then displayed his police shield and placed both plaintiffs (two of his neighbors) under arrest. Thereafter, uniformed police officers arrived, the neighbors were treated at a hospital, and were then taken to a local precinct and were booked on a charge of assault, and resisting arrest, respectively. The court held that officers actions on "were taken for purely personal reasons, and not in furtherance of any duty owed to the city" (*id.* at 532; *see also Mahmood,* 2003 WL 21047728, *3, 2003 US Dist LEXIS 7754, *11 [SD NY May 8, 2003, No. 01-CIV- 5899 (SAS0)] [court granted *summary judgment* of City where, after being honked at by the driver in vehicle behind him, plainclothes police officer working undercover left his vehicle, approached driver of vehicle which honked, displayed badge and identified himself as police officer, and without justification attempted to punch driver, then ordered him out of vehicle and assaulted him, finding that the officer was not acting in the scope of his employment but solely out of personal rage]). In contrast, Michael's actions in directing plaintiffs to return to their car, in identifying himself as a police officer to

plaintiffs and the ambulance drivers, and in essentially controlling/directing the nature of the incident demonstrate, at least at this stage of the proceedings, that he was acting under color of law and not purely for personal reasons (*see Abdelaziz,* 2016 WL 1465355, *2, 2016 US Dist LEXIS 50332, *6 [ED NY 2016, April 14, 2016, No. 13- CV-7268 (SJ/(VMS)] [road rage incident between plaintiff and defendant/off-duty officer where court declined to grant motion of City of New York and officer to dismiss complaint because complaint sufficiently alleged that officer acted "color of law" where determination was fact intensive and dismissal was inappropriate at early stage of proceedings absent discovery]).

Based upon the foregoing, that branch of defendants' motion to dismiss plaintiffs' § 1983 claim as to Michael Zak is denied.

In summary, that branch of defendants' motion to dismiss the complaint as to Michael Zak is denied, and plaintiffs' cross motion for an extension of time to serve Steven Zak is granted.

This constitutes the decision and order of the court.

ENTER

Katherine A. Levine

J. S. C. HON. KATHERINE A. LEVINE
JUSTICE SUPREME COURT