SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. HASA A. KINGO **PART** 05M

Justice

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VICTOR VALENTIN,

Plaintiff,

- v -

THE CITY OF NEW YORK, DET. ALEXANDER SOSA, JOHN DOE

Defendant.

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INDEX NO. 151033/2016

MOTION DATE 12/08/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendants the City of New York (the "City") and Detective Alexander Sosa ("Detective Sosa") move pursuant to CPLR § 3211 (a)(8) and 3212 to dismiss and for partial summary judgment on the complaint. The plaintiff Victor Valentin ("Plaintiff") opposes. Upon review of the above-referenced motion papers and procedural history of the case, the motion is granted in part to the extent set forth herein.

BACKGROUND

Plaintiff filed this action to recover damages for injuries and civil rights violations he sustained as the result of the execution of a search warrant on his residence and subsequent arrest by members of the New York City Police Department (the "NYPD"). On February 9, 2015, upon a judicial finding of probable cause, the Honorable Kevin B. McGrath, Jr. issued Search Warrant 166-2015 authorizing and directing any police officer of the New York City Police Department to enter and search the premises of 59-61 West 109th St., 6th Floor, Apt. 22, New York, New York (the "residence") "for cocaine and any all items that are capable of holding, containing, packaging

and/or dispensing cocaine . . . evidence of ownership and use of the target premises or the use of the property located therein by any person" (NYSCEF Doc No. 33, Milnes affirmation in support ¶ 12). Prior to issuance of the search warrant, Detective Sosa received information from a confidential informant and conducted controlled purchases involving narcotics at Plaintiff's residence (*id.* ¶ 13). On February 9, 2015, both Plaintiff and his son were leaseholders of the residence (*id.* ¶ 14). Plaintiff later admitted to using cocaine, storing cocaine in the kitchen drawers where he keeps the sugar, and to storing marijuana in the living room (*id.* ¶ 15). On February 11, 2015, at approximately 6:15 a.m., Detective Sosa and his team executed the search warrant at Plaintiff's residence (*id.* ¶ 16). Upon entering the apartment, Detective Sosa observed Plaintiff in the living room and Plaintiff's son in the bathroom taking a shower (*id.*). Detective Sosa recovered several zip lock bags containing cocaine from canisters located in the kitchen, cocaine inside of a dollar bill, and paraphernalia, including a scale, among other items (*id.*) Plaintiff was later arrested and taken to an NYPD precinct (*id.*).

Plaintiff testified at a hearing pursuant to General Municipal Law § 50-h (the "50-h hearing") that he was sleeping in the living room on the couch wearing underwear and an undershirt when the police entered the residence (Zullo affirmation ¶ 11). When he woke, he witnessed approximately 10-15 officers breaking down the door and entering the residence (*id.*). Plaintiff attests that he was very scared as the officers broke down the door, "grabbed him, threw him on the floor and started to hurt him" (*id.*). The officers purportedly "threw Plaintiff on the ground facedown, his knees hit the floor first, they stood on top of him, [] buried their knees in his back and bent his arms backwards . . . excessively beat him while he was on the flood, hit [] and kicked Plaintiff in his body, while a male officer remained on his back (*id.*). Plaintiff further attests that when he denied having drugs or handguns, the police "proceeded to tie Plaintiff up and drag

him to the middle of the living room" (*id.*). He "asked them to be careful because he had a dead arm in his right arm, the handcuffs were hurting him and he requested for the handcuffs to be in front of him rather than behind his back, but the Defendants disregarded his request, and he was cut up around his wrists" (*id.*). Later, the police allegedly took Plaintiff and his son to a van, where they "slammed Plaintiff inside the van face first on the floor," where his "knees struck the floor of the van first." (*id.*). He testified that they were left in the van for approximately five (5) hours with no supervision inside the van, as Plaintiff screamed that his knee was fractured (*id.*). Finally, he testified that at the precinct "Defendant" told him that "if someone asks him if he needs a doctor or ambulance for his injured knee or arm to say no because it would take longer for him to see a judge and it would be worse for his case" (*id.*) As a result of this incident, Plaintiff alleges he sustained injuries to his right knee, cervical spine, and right shoulder (*id.* ¶ 12).

According to the Criminal Court Complaint, Plaintiff was charged with Criminal Possession of a Controlled Substance in the Third Degree, Penal Law § 220. 16 (1); Criminally Using Drug Paraphernalia in the Second Degree, Penal Law §§ 220.50 (2) & 220.50 (3); Criminal Possession of a Controlled Substance in the Seventh Degree, Penal Law § 220.03; Unlawful Possession of Marijuana, Penal Law 221.05 (NYSCEF Doc No. 33, Milnes affirmation in support ¶ 17). The charges against Plaintiff were ultimately vacated, dismissed, sealed and expunged (Zullo affirmation ¶ 23).

On February 8, 2016, Plaintiff commenced this action by filing a summons and complaint, which interposes six causes of action for (1) assault and battery and excessive force, (2) negligence, (3) false arrest and false imprisonment, (4) malicious prosecution, (5) excessive force and assault and battery under 42 U.S.C. § 1983, and (6) failure to intervene under 42 U.S.C. § 1983. The City

served an answer on February 24, 2016, and the parties proceeded to discovery. Defendants now move to dismiss and for summary judgment as follows:

1. Pursuant to CPLR § 3211(a)(8), § 3125(c), and § 306(b), dismissing Plaintiff's claims against Detective Sosa for failure to move for a default judgment and because personal jurisdiction was never obtained as he was never served;

2. Pursuant to CPLR § 3125(c), § 1024 and § 306(b) dismissing Plaintiff's claims against JOHN DOE'S #1 and #2 for failure to timely substitute with the Statute of Limitations;

3. Pursuant to CPLR § 3212, granting Defendants summary judgment and dismissing Plaintiff's claim for false arrest and false imprisonment pursuant to state law and 42 U.S.C. § 1983, as there was probable cause to arrest Plaintiff and City Defendants are qualifiedly immune from suit;

4. Pursuant to CPLR § 3212, for summary judgment dismissing plaintiff's claims for malicious prosecution under state and federal law because there was probable cause to prosecute Plaintiff, there's no evidence of actual malice in his prosecution and the City Defendants are qualifiedly immune from suit;

5. Pursuant CPLR § 3212, dismissing plaintiff's constitutional claims under the 4th, 8th and 14th Amendments because the City Defendants did not deprive Plaintiff of his Constitutional rights;

6. Pursuant to CPLR § 3211(a)(7), dismissing Plaintiff's causes of action for negligence because it is duplicative of Plaintiff's other claims;

7. Pursuant to CPLR § 3211(a)(7), dismissing Plaintiff's claim for negligent hiring, retention training and supervision because the City of New York admits that its employees were acting within the scope of their employment at all times relevant to the underlying incident;

8. For such other and further relief as this Court may deem just and proper.

(NYSCEF Doc No. 32, Notice of Motion). Plaintiff opposes.

DISCUSSION

Defendants first move to dismiss the claims against Detective Sosa pursuant to CPLR § 3211 (a)(8), § 3125 (c), and § 306 (b) for failure to move for a default judgment and because personal jurisdiction was never obtained as he was never served. Pursuant to CPLR § 3211 (a)(8), a motion to dismiss may be granted if "the court has not jurisdiction of the person of the

defendant." If a defendant moves to dismiss on the basis of lack of personal jurisdiction, the plaintiff must come forward with sufficient evidence to demonstrate jurisdiction (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017]). Separately, service of the summons and complaint is required within one-hundred and twenty (120) days after the commencement of an action or proceeding (CPLR § 306-b). Section 3215 (c) of the CPLR provides that if "the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed."

This action was commenced by service of a summons and complaint on February 8, 2016. No affidavits of service were filed in connection with service of process on either defendant, but filings annexed to a prior unrelated motion attest that the City served an answer on February 14, 2016 (NYSCEF Doc No. 4, Horan affirmation; NYSCEF Doc No. 7, answer). In opposition to this motion, Plaintiff represents that Detective Sosa was served by substituted service on March 2, 2016, as memorialized in an affidavit of service annexed to the Affirmation of Anthony Zullo, Esq. in Opposition to this motion (NYSCEF Doc No. 49, exhibit A, Affidavit of Service). The affidavit of service indicates that on March 2, 2016, process server Anderson Chan served a copy of the summons and verified complaint with notice of commencement of action subject to mandatory electronic filing on Detective Sosa by delivering a copy of the documents to Amante Marinas, a person of suitable age and discretion, identified as a co-worker of Detective Sosa, at his actual place of business located at C/O NYPD NARCOTICS DIVISION, 1 POLICE PLAZA, ROOM 1100, NEW YORK, NY 10007, and, on the same date, mailing a copy of the documents to Detective Sosa by regular first class mail in an envelope marked PERSONAL &

CONFIDENTIAL with no indication on the outside that the communication is from an attorney or concerns an action against the person to be served.

Substitute service may be made upon a defendant by "delivering the summons within the state to a person of suitable age and discretion" at the defendant's actual place of business," and, within twenty days of service, mailing the summons to their actual place of business by first class mail in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against them (CPLR § 308 [2]). Proof of substitute service "shall be filed with the clerk of the court within twenty days of either delivery or mailing, and service is deemed complete ten days after mailing" (*id.*).

A process server's affidavit ordinarily constitutes a *prima facie* showing of proper service (*see Fed. Nat'l Mortg. Ass'n v David*, 172 AD3d 572, 573 [1st Dept 2019]). New York courts clearly distinguish between proof of service and the fact of proper service, which confers jurisdiction (*see Matter of Savitt*, 161 AD3d 109, 115 [1st Dept 2018]; *Air Conditioner Training Corp. v Pirrote*, 270 AD 391, 393 [1st Dept 1946]["It is the fact of proper service which confers jurisdiction. Once such service has been made, an insufficient proof thereof will not take away the jurisdiction which has in fact been obtained. The deficiency in the proof may be supplied."]). It has long been held that the failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured *nunc pro tunc* by motion or *sua sponte* by the court in its discretion pursuant to CPLR § 2004 (*Matter of Savitt*, 161 AD3d 109, 115 [1st Dpet 2018]; *Khan v Hernandez*, 122 AD3d 802, 803 [2st Dept 2014]).

In this case, the affidavit of service filed with Plaintiff's opposition to the motion is sufficiently detailed to make a *prima facie* showing that Detective Sosa was properly served with

process by substitute service, albeit with a procedural irregularity that Plaintiff failed to file the affidavit of service. The City's mere denial of receipt is insufficient to rebut the presumption of proper service (*Edan v Johnson*, 117 AD3d 528, 529 [1st Dept 2014][Bald claims insufficient to rebut *prima facie* proof of service]). Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by a process server's affidavit, a traverse hearing is not required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits (*id.*; *Indymac Fed. Bank FSB v Quattrochi*, 99 AD3d 763, 764 [2d Dept 2012]). Moreover, Detective Sosa was unquestionably aware of the action, as evidenced by his attendance at a deposition where he was represented by Corporation Counsel, who now move to dismiss on his behalf (*see* NYSCEF Doc No. 42 at 2). Provided that he is afforded the opportunity to appear and answer the complaint, Detective Sosa will suffer no prejudice as the result of the court curing the procedural irregularity by deeming the Affidavit of Service filed *nunc pro tunc* to the date of service (*see First Fed. Sav. & Loan Ass'n of Charleston v. Tezzi*, 164 AD3d 758, 760[2d Dept 2018]["The court may not make such relief retroactive, to the prejudice of the defendant, by placing the defendant in default as of a date prior to the order . . . [r]ather, the defendant must be afforded an additional 30 days to appear and answer after service upon her of a copy of the decision and order"]). Therefore, the motion to dismiss the complaint against Detective Sosa is denied, and he will be afforded 30 days from entry of this order to answer the complaint.[1]

[1] It is also noted that the City's motion pursuant to CPLR § 3215 is not compelling. Because service was never completed, Detective Sosa's time to answer the complaint had not started and he was not in default (*First Fed. Sav. & Loan Ass'n of Charleston v Tezzi*, 164 AD3d at 760 ["Since service was never completed, the defendant's time to answer the complaint had not yet started to run and, therefore, she could not be in default"]).

Defendants also move pursuant to CPLR § 3125 (c), § 1024, and § 306 (b) to dismiss Plaintiff's claims against the unnamed John Doe's #1 and #2 for failure to timely substitute within the statute of limitations. Plaintiff offers no opposition to this portion of the motion and has not proffered the identity or existence of any unnamed defendants. Therefore, this portion of the motion is granted and the complaint is dismissed as against the unnamed John Doe's #1 and #2.

Defendants next move pursuant to CPLR § 3212 for summary judgment to dismiss Plaintiff's causes of action for false arrest and false imprisonment pursuant to state and federal law, for malicious prosecution under state and federal law, and Plaintiff's constitutional claims under the 4th, 8th, and 14th Amendments. A motion for summary judgment "shall be granted if, upon all the papers and proofs submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party" (CPLR § 3212[b]). "The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013][internal quotation marks and citation omitted]). Upon proffer of evidence establishing a *prima facie* case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility"

(*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010][internal quotation marks and citation omitted]).

Where a Defendant moves to dismiss pursuant to CPLR § 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994][citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "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 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002][internal citations omitted]). "However, when evidence is submitted on a motion to dismiss, we look to whether plaintiff has a cause of action, rather than whether it is pleaded" (*Braun v Lewis*, 99 AD3d 574 [1st Dept 2012]; citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

A. False Arrest and Imprisonment

"In New York, the tort of false arrest is synonymous with that of false imprisonment "(*Posr v Doherty*, 944 F2d 91, 96 [2d Cir 1991]). The elements of false arrest are "substantially the same" under state and federal law and require the same analysis (*Crooks v City of New York*, 189 AD3d 771, 771 [2d Dept 2020]). "Under the common law, a plaintiff may bring suit for false arrest and imprisonment against one who has unlawfully robbed the plaintiff of [their] 'freedom from restraint of movement'" (*De Lourdes Torres v Jones*, 26 NY3d 742, 759 [2016], quoting *Broughton v State of New York*, 37 NY2d 451, 456 [1975], *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929 [1975][other citation omitted]). To prevail on a cause of action for false arrest

or imprisonment, "the plaintiff must demonstrate that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement, that the plaintiff did not consent to the confinement, and that the confinement was not privileged" (*DeLourdes Torres*, 26 NY3d at 759 [citations omitted]; *see Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]; *Broughton*, 37 NY2d at 456-457, *supra*).

"For purposes of the privilege element of a false arrest and imprisonment claim, an act of confinement is privileged if it stems from a lawful arrest supported by probable cause" (*De Lourdes Torres*, 26 NY3d at 759 [citations omitted]; *see Gann v City of New York*, 197 AD3d 1035, 1035 [1st Dept 2021]["showing of probable cause to arrest is a complete defense to an unlawful arrest and imprisonment claim"]). "Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty" (*Colon v City of New York*, 60 NY2d 78, 82 [1983]; *see De Lourdes Torres*, 26 NY3d at 759; *Atwater v City of Lago Vista*, 532 US 318, 354 [2001]["If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender"]).

A detention occurring in connection with a search warrant gives rise to a presumption of probable cause for the detention, which the plaintiff must rebut (*see Broughton*, 37 NY2d at 458, *supra* ["Magistrate's consideration of the arrest warrant application will generate a presumption that the arrest was issued on probable cause"]; *Lee* 272 AD2d 586, 587 [2d Dept 2000]["detention during the execution of a facially-valid search warrant is constitutionally permissible"]). An arrest or search conducted pursuant to a warrant is presumed reasonable because such warrants may issue only upon a showing of probable cause (*see Walczyk v Rio*, 496 F3d 139, 144 [2d Cir 2007]). A person constructively possesses contraband when they "have physical possession or otherwise to

exercise dominion or control over tangible property" (*People v Manini*, 79 NY2d 561, 573 [1992]["A defendant may constructively possess property if he has dominion and control over the drugs as a result of his authority over the person who actually possesses them, rather than through his access to or control over the place where the drugs are kept"]). Evidence that a defendant owned, rented, or had control over or a possessory interest in a premises supports a finding of constructive possession (*Manini*, 79 NY2d at 573, *supra*; *People v Tirado*, 47 AD2d 193, 195 [1st Dept 1975], *affd*, 38 NY2d 955 [1976]).

Where, as here, the search of Plaintiff's residence was conducted pursuant to a search warrant issued by a Magistrate, it is presumed to be supported by probable cause. Plaintiff does not challenge the validity of the warrant or that members of the NYPD recovered cocaine from his residence upon execution of the search warrant. Although Plaintiff suggests that additional discovery is required, he does not point to any facts essential to justify opposition which may exist but cannot be stated (CPLR § 3212 [f]). Furthermore, on September 23, 2022, Plaintiff filed a Note of Issue and Certificate of Readiness, verifying that "discovery proceedings now known to be necessary are completed," which contradicts the asserted need for additional discovery (NYSCEF Doc No. 30, Note of Issue). Therefore, no question of fact exists regarding whether probable cause existed for his detention and arrest (*see Hedian v The City of New York*, 2020 NY Slip Op 30163[U][Sup Ct, NY County 2020]; *Banner v The City of New York*, 2020 WL 6382734 [Sup Ct, Bronx County 2020]). As such, Defendants have a complete defense to the cause of action for false arrest and false imprisonment and are entitled to summary judgment regarding this cause of action.

B. Malicious Prosecution

Like false arrest, the elements of malicious prosecution are substantially the same under state and federal law (*Crooks*, 189 AD3d at 771, *supra*). To recover damages for malicious

prosecution, a plaintiff must establish (1) that a criminal proceeding as initiated against them, (2) it termination favorably to plaintiff, (3) lacked of probable cause, and (4) was brought out of actual malice (*Morant v City of New York*, 95 AD 3d 612 [1st Dept 2012] *quoting Colon v City of New York*, 60 NY2d 78,82 [1983]; *Martinez v City of Schenectady*, 97 NY2d 78, 84 [2001]). The existence of probable cause constitutes a complete defense to a claim of malicious prosecution (*Lawson v City of New York*, 83 AD 3d 609 [1st Dept 2011]). As discussed above, the officers had probable cause for Plaintiff's detention and arrest. Therefore, summary judgment dismissing the cause of action for malicious prosecution is appropriate.

C. Qualified Immunity

Defendants argue that the complaint should be dismissed against Detective Sosa in its entirety because he is entitled to qualified immunity and therefore immune to suit. Under state law, "[a] government official performing a discretionary function is entitled to qualified immunity provided his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (*Liu v New York City Police Dept*, 216 AD2d 67, 683 [1st Dept 1995]). In order to determine whether the doctrine of qualified immunity may be invoked, the court must determine (1) the identification of the specific right allegedly violated, (2) whether that right was so "clearly established" as to alert a reasonable official to its constitutional parameters, and (3) whether a reasonable official could have believed that the particular conduct at issue was lawful (*id.*). "To be entitled to qualified immunity, it must be established that it was objectively reasonable for the police officer involved to believe that his or her conduct was appropriate under the circumstances, or that officers of reasonable competence could disagree as to whether his or her conduct was proper" (*Delgado v City of New York*, 86 AD3d 502, 510 [1st Dept 2011]). "The standard for qualified immunity under New York law

parallels federal qualified immunity jurisprudence" (*Al-Anesi v City of New York*, 2022 WL 1948879 [SDNY 2022]).

Under federal law, "[q]ualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (*White v Pauly*, 580 US 73 78-79 [2017][*per curiam*]). "An officer may take advantage of qualified immunity, and thereby avoid liability for civil damages and the burdens of a lawsuit, if he demonstrates that his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (*Lennox v Miller*, 968 F3d 150 [2d Cir 2020]). The court must utilize a two-part analysis regarding qualified immunity under federal law, (1) whether the defendant violated a statutory or constitutional right, and (2) whether the right was "clearly established" at the time of the challenged conduct (*Jones v Treubig*, 963 F3d 214, 224 [2d Cir 2020]).

Although Defendants are correct that the existence of probable cause entitles Detective Sosa to qualified immunity for the false arrest, false imprisonment, and malicious prosecution causes of action (*see Escalera v Lunn*, 361 F3d 737 [2d Cir 2004]), qualified immunity does not attach on a cause of action for excessive force absent a determination that the officer's use of force was objectively reasonable under the circumstances presented at the time of arrest (*see Lennox v Miller*, 968 F3d at 157 [summary judgment on qualified immunity properly denied where issues of fact existed regarding reasonable of officer's use of force]; *Bennett v NYC Housing Authority*, 245 AD 2d 254 [2nd Dept 1997]["the existence of probable cause does not bar causes of action sounding in assault and battery based upon the use of excessive force"]). "Because of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide" (*Holland v City of Poughkeepsie*, 90 AD3d 841, 844 [2d

Dept 2011]). Whereas Defendants do not move for summary judgment on Plaintiffs causes of action for assault and battery and excessive force, questions of fact exist regarding whether the use of force was reasonable under the circumstances presented (Schaefer reply affirmation ¶ 3 ["It should also be noted that Defendants do not move for dismissal or Summary Judgment on Plaintiff's State Assault and Battery and Federal Excessive Force claims"]). This precludes the court from making a determination at this time regarding whether Detective Sosa may benefit from qualified immunity with respect to the causes of action for assault and battery and excessive force (*see Snow v Schreier*, 193 AD3d 1346, 1348 [4d Dept 2021][False arrest claim dismissed due to existence of probable cause, but defendants failed to establish that they were entitled to summary judgment on the excessive force cause of action on the ground of qualified immunity where questions of fact existed regarding whether officers' conduct was objectively reasonable]). Therefore, summary judgment is denied with respect to the issue of qualified immunity.

D. Negligence and Negligent Hiring and Retention

Plaintiff's second cause of action seeks to impose liability upon Defendants on the basis of negligence or "negligent hiring, negligent retention, and negligent training" (NYSCEF Doc No. 1, complaint ¶ 19). As an initial matter, a plaintiff who seeks damages that arise from an arrest and detention may not recover under general negligence principles (*Ferguson v Dollar Rent A Car, Inc.*, 102 AD3d 600, 601 [1st Dept 2013]). Rather, "recovery must be determined by established rules defining the torts of false arrest and imprisonment and malicious prosecution, rules which permit damages only under circumstances in which the law regards the imprisonment or prosecution as improper and unjustified" (*id.*). Moreover, "where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of *respondeat superior*, no claim may proceed against

the employer for negligent hiring or retention" (*Karoon v New York City Transit Auth.*, 241 AD2d 323, 324 [1st Dept 1997]). Therefore, Plaintiff may not proceed on a theory of general negligence or negligent hiring and retention, and Defendants are entitled to summary judgment on the second cause of action.

E. Federal constitutional claims

Plaintiff's fifth cause of action alleges that by "assault and battery, victimization of excessive force, false arrest, malicious prosecution, and the negligence of the defendants and defendant the CITY in the negligent hiring, negligent retention, and negligent training of certain of its employees and/or police officers," violated Plaintiff's civil rights "guaranteed by the 4th Amendment, 8th Amendment and 14th Amendment of the United States Constitution insofar as being deprived of his right to due process and to be free from cruel and unusual punishment" (NYSCEF Doc No. 1, complaint ¶ 43). Plaintiff's sixth cause of action alleges that Defendants deprived Plaintiff of his constitutional rights "guaranteed by the 4th, 8th, and 14th Amendments, specifically "the right to receive timely and proper medical care while in police custody" (NYSCEF Doc No. 1, complaint ¶ 51). Although not a model of clarity in pleading, it appears that both claims seek to interpose a cause of action for federal civil rights violations under 42 U.S.C. § 1983 against Detective Sosa and claims against the City (*Monell*).

Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured" (42 USC § 1983). To the extent that Plaintiff seeks to assert a 1983 cause of action against Detective Sosa, he may proceed on the remaining causes of action for excessive force and assault and battery (*see* discussion of claims, supra at 9-14; *Corcoran v City*

of New York, 186 AD3d 1151, 1152 [1st Dept 2020]["A person has a private right of action under 42 U.S.C. § 1983 against police officers who, acting under color of law, violate federal constitutional or statutory rights"]; *Delgado v City of New York*, 86 AD3d 502, 510 [1st Dept 2011]["A complaint alleging gratuitous or excessive use of force by a police officer states a cause of action under the statute against that officer"]).

Turning to the City, a municipality "is not vicariously liable for its employees" actions under § 1983 (*Connick v Thompson*, 563 US 51, 60 [2011], citing *Monell v Dep't of Soc. Servs. of City of New York*, 436 US 658, 691 [1978]). "Rather, it is only when the municipality itself commits the misdeed, that is, 'when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983'" (*Walker v City of New York*, 974 F2d 293 [2d Cir 1992], citing *Monell v Dept of Soc. Servs. of City of New York*, 436 US 658, 694 [1978]). As discussed above, no claim may proceed against the City for negligent hiring and retention (*see supra* at 14-15). Additionally, the complaint pleads neither a policy or custom that led to a violation of Plaintiff's constitutional rights to support a cause of action asserted directly against the City (*see Liu v New York City Police Dept*, 216 AD2d 67, 68 [1st Dept 1995]; *Boddie*, 2016 WL 1466555 at *4).

"Under limited circumstances, proof of a municipality's failure to train can be the basis for liability under § 1983" (*id*. at 848). This is permitted "only where the municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983" (*id.*). "To allege deliberate indifference in the context of a failure-to-train claim, a plaintiff must plead facts giving rise to a plausible inference that (1) the municipality

knows 'to a moral certainty' that its employees will confront a given situation, (2) either the situation presents the employees with a difficult choice of the sort that training will make less difficult, or there is a history of employees mishandling the situation, and (3) the wrong choice by the employee will frequently cause a constitutional deprivation (*id.*; *see also Holland*, 90 AD3d at 847). "A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train" (*Boddie v City of New York*, 2016 WL 1466555 [SDNY 2016]).

To establish liability under a theory of failure to train, a plaintiff must "identify a specific deficiency in the city's training program and establish that that deficiency is 'closely related to the ultimate injury,' such that it 'actually caused' the constitutional deprivation" (*Amnesty Am. v Town of W. Hartford*, 361 F3d 113 [2d Cir 2004], citing *City of Canton*, 489 US 378, 390-391 [1989]). "The elements of an identified training deficiency and a close causal relationship, which together require the plaintiffs to prove that the deprivation occurred as the result of a municipal policy rather than as a result of isolated misconduct by a single actor, ensure that a failure to train theory does not collapse into *respondeat superior* liability" (*id.*). Here, Plaintiff fails to identify a training deficiency, close causal relationship, or a pattern of similar constitutional violations by untrained employees. Instead, Plaintiff asserts only that it is "self-evident" that the City had deliberate indifference by virtue of the injuries sustained by Plaintiff (Zullo affirmation in opposition at 12). This is insufficient to impose liability under § 1983 for failure to train. Therefore, the City is entitled to summary judgment, and Plaintiff's fifth and sixth causes of action are dismissed as against the City.

Accordingly, it is

ORDERED that Defendants' motion for summary judgment is granted in part and to the extent set forth herein; and it is further

ORDERED that the affidavit of service filed at NYSCEF Doc No. 49 is deemed served *nunc pro tunc* as of the date of entry of this order; and it is further

ORDERED that defendant Detective Alexander Sosa shall have 30 days from entry of this order to file an answer to the complaint; and it is further

ORDERED that the complaint is dismissed as against the unnamed John Doe's #1 and #2, and the caption shall be so amended; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption is to be amended to reflect the dismissal and that all future papers filed with the court shall bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

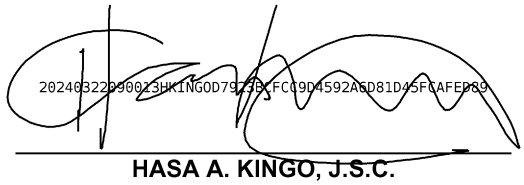
ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website)]; and it is further

ORDERED that the second, third, and fourth causes of action are dismissed in their entirety; and it is further

ORDERED that the fifth and sixth causes of action are dismissed as against defendant the City of New York; and it is further

ORDERED that a status and settlement conference for this matter shall be held on April 30, 2024 at 12:30 p.m. in the courtroom located at 80 Centre Street, New York, New York, Room 320.

This constitutes the decision and order of the court.



3/22/2024
DATE

HASA A. KINGO, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE