

<b>Gruben v City of New York</b>
2026 NY Slip Op 31566(U)
April 10, 2026
Supreme Court, Kings County
Docket Number: Index No. 525959/2020
Judge: Lisa Lewis
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At City Part 25 of the Supreme Court of the State State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 10<sup>th</sup> day of April, 2026

**P R E S E N T :**  
HON. LISA LEWIS

Justice

\_\_\_\_\_  
JACOB YASHA GRUBEN,

Plaintiff,

Index No.: 525959/2020

-against-

**DECISION AND ORDER**

THE CITY OF NEW YORK, NEW YORK CITY  
POLICE DEPARTMENT and JOHN DOES 1-3, and  
Andrew Hong,

Motion Sequence 8

Defendants.

\_\_\_\_\_  
The following papers numbered 1 to read herein  
Notice of Motion/Order to Show Cause/  
and Affidavits (Affirmations) Annexed  
Cross Motion and Affidavits (Affirmation) Annexed  
Answers/Opposing Affidavits (Affirmations)  
Reply Affidavits (Affirmations)  
Affidavit (Affirmation)  
Other Papers

Papers Numbered

130-131

132-140;142

141

Upon the foregoing papers, it is ordered that the motion is determined as follows:

Plaintiff's motion, pursuant to CPLR § 2221 for leave to reargue plaintiff's opposition to defendants' motion for summary judgment (Seq. 7), which resulted in the Decision and Order of this Court dated August 26, 2025 ("Order"), and upon reargument, vacate said Order as to the dismissed federal and state claims, and upon vacatur, deny defendants' motion for summary judgment on the dismissed claims (Seq. 8).

## BACKGROUND

A full discussion of the facts giving rise to this action is more fully set forth in the Order. Defendants' motion for summary judgment (Seq. 7) was granted in its entirety. Plaintiff now moves for reargument of plaintiff's opposition from motion sequence 7, and upon reargument, vacate the Order as to the federal and state claims and deny defendant's motion for summary judgment on those claims.

## PARTIES CONTENTIONS

### *Plaintiff's motion to reargue*

Plaintiff asserts the Court did not dismiss plaintiff's state law excessive force and false arrest claims against the City. Plaintiff argues the Court overlooked and misapprehended material facts, misapplied controlling principles of law regarding § 1983 liability, and failed to consider substantial admissible evidence submitted by plaintiff that creates triable issues of fact precluding summary judgment. Specifically, the Court overlooked the overwhelming evidence of the individual officer's misconduct and unconstitutional municipal customs.

Plaintiff argues the Court overlooked Sergeant Andrew Hong's ("Hong") own admissions that he restrained plaintiff by grabbing him. Hong assisted in placing plaintiff under arrest and admitted he saw nothing in the video shown to him at the deposition that would support probable cause. Plaintiff argues the City attorneys have not attempted to articulate probable cause in the motion papers or at any point during the litigation. Therefore, any amount of force is excessive force as a matter of law. Plaintiff argues, under reasonableness of force that there was no crime, no immediate threat to the safety of officers or others as plaintiff was merely filming and plaintiff was not resisting but was standing peacefully when officers grabbed him.

Plaintiff further argues Hong is independently liable for false arrest under § 1983. Plaintiff argues Hong helped effectuate an arrest without probable cause, which violated plaintiff's Fourth Amendment rights. Plaintiff argues (1) Hong had the intent to confine plaintiff, as Hong admitted he was assisting another officer to arrest plaintiff, (2) plaintiff was conscious of the confinement as he was grabbed, thrown to the ground, zip-tied, and held on a bus for over an hour, (3) plaintiff never consented to being seized, detained, or arrested, and (4) the confinement was not privileged, as Hong admitted he saw nothing in the video supporting probable cause.

Plaintiff argues the Court did not make a meaningful analysis of the photographic evidence and Hong's body worn camera footage. Plaintiff asserts the photographic evidence shows the exact moment Hong is restraining plaintiff while another officer, NYPD Sergeant David McCann ("McCann"), strikes him with a baton. Plaintiff argues the body worn camera footage shows Hong restraining plaintiff at the precise moment the baton is striking plaintiff before the recording terminates.

Plaintiff argues the Court misapprehended the issue of the body worn camera being broken. Plaintiff argues the only documentation City provided was an Information Technology Bureau ("ITB") ticket, showing Hong's body worn camera was reported broken on July 6, 2020, over five (5) weeks after the May 29, 2020 incident and the ticket made no mention of the May 29, 2020 incident or any connection to the events at issue in this case. Plaintiff notes the ticket merely states "Slide Switch Broke off Camera" with no explanation of when, where, or how it occurred and there are questions regarding why the repair was not sought earlier and why there is no documentation linking the "break" to this incident, thereby raising issues of Hong's credibility and his account of events. Moreover, plaintiff argues the ITB documentation was improperly raised for the first time in defendants' reply papers as new evidence.

Plaintiff argues the Court also overlooked Hong's documented credibility issues. Plaintiff notes Hong testified that he had never been sued for excessive force but he was named as a defendant in at least two (2) prior excessive force lawsuits. Plaintiff argues Hong's disciplinary history is also publicly available from the Kings County District Attorney's Office, which reveals a pattern of dishonesty and failure to report misconduct.

Plaintiff argues the Court overlooked that defendants failed to establish their prima facie burden by submitting evidence in admissible form. Specifically, defendants failed to provide Hong's body worn camera with their moving papers and defendants' moving papers made no mention of Hong's body worn camera and did not rely upon it in their Statement of Facts. The body worn camera was made available by plaintiff in opposition. Thus, defendant movants' failure to submit the body worn camera footage means they failed to meet their burden and the Court erred in granting summary judgment based on evidence defendants did not provide in their moving papers.

Plaintiff argues the Court misapplied § 1983 liability. Plaintiff relies on *Pressley v City of New York*, 233 AD3d 932 (2d Dept 2024) and *Jackson v City of Saratoga Springs*, 81 Misc 3d 490 (Sup Ct, Saratoga County 2023) and argues similarly to the officers in those cases, Hong's restraint prevented plaintiff from moving, defending himself, or escaping and directly facilitated the baton strike that shattered plaintiff's kneecap. Plaintiff argues Hong's conduct of grabbing and restraining the plaintiff was objectively unreasonable or created a question of fact for the jury.

Plaintiff argues the Court misapplied the failure to intervene doctrine and that the "Court stated Hong 'did not have a realistic opportunity to intervene' because the interaction 'lasted no more than four seconds'" and referenced the Order (NYCSEF Doc. No 129 at p.7). Plaintiff argues the claims against Hong are based on his direct participation and not the failure to intervene.

Plaintiff argues Hong did not stand by and watch, instead Hong actively grabbed and restrained plaintiff, facilitating the assault. Plaintiff argues that even under the failure to intervene analysis, Hong had a realistic opportunity to intervene and was in the best possible position to intervene. However, Hong did nothing to prevent or stop the officer from striking plaintiff and he had knowledge that a constitutional violation was occurring.

As to the Monell claim, plaintiff argues the Court overlooked that plaintiff served a detailed Supplemental Verified Bill of Particulars (“Supplemental BP”) on July 12, 2023 (NYSCEF Doc. No. 38), which provides extensive factual allegations regarding NYPD policies, customs and practices that directly caused the violations of plaintiff’s rights, including, *inter alia*, longstanding pattern of excessive force, mass arrests, the use of batons against peaceful protestors, mass detention without charges, failure to train and supervise and prior lawsuits and official government reports. Plaintiff argues the NYC Department of Investigation’s (“DOI”) 2020 Report, Attorney General reports and the two-decade history of similar litigation, constitute overwhelming proof of a de facto policy and custom of suppressing protest through excessive force and unlawful arrests and same are proof of City’s deliberate indifference to its lack of training and supervision, leading to constitutional violations.

Plaintiff also argues the record contradicts the Court’s findings that there is a “lack of causal link between the policies . . . of the municipality, and any alleged constitutional violations.” Plaintiff argues that the conduct he was subjected to was not an isolated action but a foreseeable, direct result of City’s longstanding, unconstitutional customs in policing protest. Plaintiff argues there are material issues of facts as to (1) whether the NYPD engaged in indiscriminate force and mass arrests during the May-June 2020 protests; (2) whether the City’s failure to train, supervise,

and discipline was a moving force behind plaintiff's injuries; and (3) whether plaintiff's violent seizure and beating fit into a recurring and unconstitutional NYPD pattern.

As to the abuse of process claim, plaintiff argues he was released without charges after over an hour of detention, which supports the inference that the arrest and detention were pretextual, served a collateral objective, and were not for any legitimate law enforcement purpose, but to suppress First Amendment-protected activity and questions of fact exist.

As to the equal protection claim, plaintiff argues he was seized immediately after filming an officer using force, beaten and detained while others continued to protest, which supports an inference of selective enforcement.

### *Defendants' opposition*

Defendants argue plaintiff failed to demonstrate in what manner the court overlooked or misapprehended relevant facts or law. Defendants note plaintiff cited to Hong's testimony, wherein he stated he was there to assist placing plaintiff in custody. However, plaintiff left out the part where Hong described how he assisted. Defendants argue that Hong's only involvement was attempting to grab plaintiff but ended up falling to the ground and the court was correct in granting defendants' summary judgment on plaintiff's federal excessive force claim against Hong, as he was not the one who hit plaintiff with a baton and had only "grabbed plaintiff but was somehow dragged forward and fell to the ground". Defendants argue the photographic evidence supports Hong's testimony that at some point his knees hit the ground, which can be seen in the photo. Defendants also argue plaintiff's contention that the Court overlooked Hong is independently liable for false arrest, is wrong, as they only moved to dismiss excessive force against Hong. Thus, the Court did not need to reach a determination regarding Hong's liability for false arrest.

As to the controlling law regarding § 1983 liability, defendants repeat that Hong was not the officer that restrained plaintiff and his only involvement was that “he grabbed plaintiff but somehow was dragged forward and fell to the ground”. Defendants contend plaintiff cannot argue Hong failed to intervene to prevent plaintiff’s own constitutional violation and was a direct participant. Defendants argue that the Court correctly found based on the limited duration of the interaction between Hong and plaintiff that Hong did not have a realistic opportunity to intervene.

In the alternative, defendants argue, if the Court is inclined to reconsider plaintiff’s motion for renewal, the Court should adhere to its original decision and upon re-argument grant defendants’ motion for summary judgment. Defendants maintain the Court correctly granted its motion for summary judgment that plaintiff failed to sufficiently plead the necessary elements, which would constitute a 42 U.S.C. § 1983 violation. Defendants argue that their affirmation in support and plaintiff’s summons and complaint failed to reference any allegation of an unconstitutional custom or policy or that such policy was casually connected to the alleged violations of plaintiff’s rights. Defendants repeat that Hong was not the actor that perpetuated the constitutional violation and reiterates Hong had no reason to know if any other law enforcement officials committed a constitutional violation due to the short duration of the interaction with plaintiff and that Hong did not use excessive force on plaintiff.

As to the Monell claim, defendants argue the Court was correct in finding the plaintiff’s Monell claim was not properly pled. Defendants argue plaintiff cannot cure a deficiency in the pleadings with the Supplemental BP. Defendants argue plaintiff is not merely seeking to supplement the complaint but also to add additional allegations of wrongful policies of the City in order to satisfy their Monell claim, which is beyond the supplemental nature of a bill of particular.

### *Plaintiff's Reply*

Plaintiff argues that defendants conceded that they never sought summary judgment on Plaintiff's § 1983 false arrest claim against Sergeant Hong, yet the Court nonetheless dismissed it.

As to excessive force and probable cause, plaintiff argues that under settled Second Circuit law, any force used in the absence of probable cause is unreasonable as a matter of law and repeat their argument in support. As to false arrest, plaintiff notes that defendants admit they only moved to dismiss excessive force against Hong. Plaintiff argues "the Court's Order dismissed 'all § 1983 claims against Sergeant Hong, including allegations of false arrest and excessive force' on NYSCEF Doc. No. 129 at p. 7," without defendants ever moving for dismissal and same is reversible error. Plaintiff reiterates Hong's testimony establishes elements of false arrest including that he went to help another officer place plaintiff under arrest, plaintiff was grabbed and thrown to the ground, zip-tied and held on a bus for over an hour, there was no consent to being seized, detained or arrested, and the confinement is not privileged. Hong assisted in an arrest without probable cause. Therefore, he is liable for the unlawful seizure.

As to color of state law allegations, plaintiff argues the Court overlooked the consolidated complaint, which alleges Hong acted under color of state law and he was within the scope of his duties as an NYPD sergeant. Moreover, defendants failed to attach the consolidated complaint in their moving papers. Defendants cannot claim plaintiff failed to allege essential elements that are expressly contained in that pleading.

Plaintiff argues defendants' attempt to distinguish between "grabbing" and "restraining" is irrelevant. Plaintiff argues Hong admitted to grabbing plaintiff's shirt and holding him and this constitutes as seizure under the Fourth Amendment. There is no justification for a stop or even a minima use of force is unreasonable.

As to Hong's participation and failure to intervene, plaintiff argues CPLR § 3015 expressly permits alternative pleading. Plaintiff asserts the primary theory is direct participation, wherein Hong grabbed, held and restrained plaintiff without probable cause while another officer struck him. The theory of failure to intervene is pled in the alternative in the event the Court were to find Hong did not directly participate, he nonetheless had an opportunity to intervene and failed to do so.

As to the Monell claim, plaintiff argues there are triable issues of fact. Plaintiff argues that the Supplemental BP provides extensive factual allegations regarding NYPD policies and customs. Plaintiff asserts defendants did not argue that the Supplemental BP was untimely, improper or should be disregarded. Plaintiff argues the Supplemental BP identifies

“the City-wide policies, customs and practices that directly caused what happened to plaintiff including: (a) the NYPD's longstanding use of “disorder-control” tactics to indiscriminately trap and arrest protesters without individualized probable cause; (b) a pattern of excessive force and mass arrests during political demonstrations; (c) the failure to issue meaningful dispersal orders before effecting mass detentions; (d) the City's failure to train, supervise, or discipline officers assigned to protest-policing; and (e) prior lawsuits and protest events (including the 2004 RNC, Critical Mass, and Occupy Wall Street) that put the City on notice of these unconstitutional practices.”

It also incorporates two (2) official government investigations, the NYC Department of Investigation Report and the New York State Attorney General's Preliminary Report, wherein both concluded “NYPD's response to the May-June 2020 protests reflected systemic policy and training failures, not isolated misconduct by individual officers.” Plaintiff argues what happened to plaintiff is a textbook example of the unconstitutional policies and customs documented in those reports, wherein he was

“seized without individualized probable cause while peacefully recording the protest, struck with a baton, zip-tied with tightly fastened flex-cuffs, detained on a bus for over an hour, and released

without any charges or paperwork— precisely the type of indiscriminate kettling, excessive force, and mass arrest the DOI and AG characterized as systemic features of the NYPD’s protest response.”

Moreover, plaintiff argues Hong’s badge was covered with black tape during the incident, rendering him anonymous, exactly as the Attorney General Report describes. Plaintiff argues he need not prove Monell liability at this stage but need only raise triable issues of fact as to whether his injuries were caused by a municipal policy, custom, or failure to train or supervise.

### DISCUSSION

A motion for leave to reargue should be based upon matters of fact or law overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion (CPLR § 2221[d][2]). “While the determination to grant leave to reargue lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*Wells Fargo Bank, N.A. v Weiss*, 237 AD3d 1003, 1005 [2d Dept 2025][internal quotation marks and citations omitted]).

As an initial matter, the Court did not dismiss plaintiff’s § 1983 false arrest claim against Hong. Although plaintiff raised the issue of false arrest in opposition (Seq. 7), defendants did not seek this relief their moving papers for summary judgment (Seq. 7). The Order does not contain any discussion nor references dismissal of plaintiff’s § 1983 false arrest claim against Hong. Therefore, the Court finds there is no reversible error on this issue. Additionally, the Order does not discuss the doctrine of failure to intervene nor the duration of the interaction between defendant Hong and plaintiff.

With respect to the consolidation order and complaint, the Court notes defendants indicated in their moving papers (Seq. 7) that this case was consolidated with a separate case, bearing index no. 515392/2023 (“Action No. 2”) for all purposes. A copy of the consolidation order was submitted as an exhibit “P” with defendants’ moving papers (Seq. 7). Upon a search of the records, the Court finds it had incorrectly deemed plaintiff failed to allege defendant Hong was acting under color of state law. The Court finds the plaintiff did, in fact, allege defendant Hong was acting under the color of state law in Action No. 2’s complaint (*D’Amico Constr., Inc. v Cow Bay Sprinkler Corp.*, 233 AD3d 1024, 1026 [2d Dept 2024]).

Turning to 42 U.S.C. § 1983 federal claims, the Court finds the plaintiff failed to sufficiently plead the Monell claim in the complaint.

“Although a bill of particulars may be used to amplify the allegations in a complaint and be considered in determining the ‘sufficiency of a pleaded cause of action’ a bill of particulars may not be used to supply essential allegations of a cause of action that was not pleaded in the complaint” (*Sullivan v St. Francis Hosp.*, 45 AD3d 833, 834 [2d Dept 2007][internal quotation marks and citations omitted]).

“The purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial. Pursuant to CPLR 3043(b), ‘[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities . . . [p]rovided however that no new cause of action may be alleged or new injury claimed.’” (*Jurado v Kalache*, 93 AD3d 759, 760 [2d Dept 2012]).

Here, the Court finds neither the complaint in this case nor Action No. 2’s complaint alleged the policies, customs or practices that directly caused the violations of plaintiff’s rights. The Court notes plaintiff’s Supplemental BP indicates it supplements “his bill of particulars and pleadings.” Moreover, by asserting the various policies and practices regarding arrests including, *inter alia*, kettling, Protest Arrest Processing Policies, Mass Arrest Processing Plan, the plaintiff was not simply amplifying but was adding new allegations, which had not been asserted in the

complaint (*L. R. v Evergreen Charter School*, 232 AD3d 920, 922 [2d Dept 2024] citing *Jurado v Kalache*, 93 AD3d at 760–761 [2d Dept 2012]). “[A]lthough the complaint alleged as a legal conclusion that the defendant[s] engaged in conduct pursuant to a policy or custom which deprived the plaintiff of certain constitutional rights, [the complaints] were wholly unsupported by any allegations of . . . the policy or custom which the conduct purportedly advanced” (*Martin v City of New York*, 153 AD3d 693, 694 [2d Dept 2017]).

As an initial matter with respect to substantial admissible evidence, the Court notes defendants did not submit the body worn camera footage in support of their moving papers (seq. 7). However, defendants met their burden having submitted and relied on the plaintiff’s testimony from the 50-H hearing and deposition as well as Hong’s deposition testimony in their moving papers.

With respect to § 1983 liability against Hong, the Court finds plaintiff’s reliance on *Pressley v City of New York*, 233 AD3d 932 (2d Dept 2024) and *Jackson v City of Saratoga Springs*, 81 Misc 3d 490 (Sup Ct, Saratoga County 2023) misplaced. The facts in *Pressley* are distinguishable from the case at hand. There, the plaintiff was arrested at his home for a shooting that had occurred earlier that day (*Pressley v City of New York*, 233 AD3d 932, 934). Plaintiff was transported to a police station, wherein he was allegedly identified as the shooter in a lineup and thereafter arraigned and was unable to post bail (*id.*). The case went to trial two years later, wherein a jury allegedly acquitted the plaintiff on all charges (*id.*). Plaintiff commenced an action to recover damages for false arrest and malicious prosecution (*id.*). Moreover, the Court in *Pressley* did not make a ruling on the issue of excessive force, officers who restrained individuals during the use of force under § 1983 or whether restraining officers’ actions directly facilitated a constitutional violation.

Similarly, the facts in *Jackson* did not involve an officer who held plaintiff while another officer struck him. The plaintiff in *Jackson* was pursued by police officers after having observed plaintiff commit what they considered to be an assault on his then girlfriend (*Jackson v City of Saratoga Springs*, 81 Misc 3d 490, 492). The pursuit proceeded into an alleyway and then onto construction scaffolding standing in the alleyway (*id.*). The chase ended when the plaintiff was discovered lying face down on the ground behind a restaurant and bar (*id.*). The Court in *Jackson* denied summary judgment, as there was a question of fact as to whether police officers administered a beating to plaintiff and a question of fact as to a constitutional violation (*id.* at 741), as it is centered on the beating of plaintiff (*id.* at 743). However, the Court in *Jackson* did not find the restraining officer's actions directly facilitated a constitutional violation nor that the restraint upon plaintiff prevented him from defending himself or escaping the assault.

With respect to the federal excessive force claim against Hong,

“[c]laims that law enforcement personnel used excessive force in the course of an arrest are analyzed under the Fourth Amendment and its standard of objective reasonableness’. The determination of an excessive force claim requires an analysis of the facts of the particular case, including ‘the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he [or she] is actively resisting arrest or attempting to evade arrest by flight’. 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” (*Shutter v Town of Poughkeepsie*, 241 AD3d 732, 732–733 [2d Dept 2025][internal quotation marks and citations omitted]).

In determining the force used in the instant case was reasonable as a matter of law, the Court relied on the photographic evidence, plaintiff's testimony from the 50-H hearing and deposition, Hong's deposition testimony, which were submitted by the defendants in support of their motion for summary judgment (Seq. 7) (*Macareno v City of New York*, 187 AD3d 1164 [2d

Dept 2020]). The Court also relied on Hong's body worn camera, which was submitted by plaintiff in support of the opposition to defendants' motion for summary judgment (Seq. 7).

The photographic evidence is black and white. It shows an officer on the furthest left (Hong) and an officer (McCann) to the right of Hong, holding a baton in his right hand. At the deposition, a photograph was shown to Hong wherein he affirms there's a white male with a NYPD cap in the center of the photograph and in his right hand is a baton.<sup>1</sup> He also affirms the officer on left of the photograph is him.<sup>2</sup>

Plaintiff testified he was filming and moving when he saw an officer grab his baton and hit an individual.<sup>3</sup> Plaintiff did not see any other part of the interaction between the individual and officer leading up to the officer pushing the individual.<sup>4</sup> Plaintiff testified an officer had pushed the individual about six, seven feet backwards.<sup>5</sup> Then he stepped in between the officer with the baton and the individual with hopes to defuse the violent situation.<sup>6</sup> Plaintiff affirms the individual was Anthony Peterson ("Peterson").<sup>7</sup> After plaintiff stepped in between the officer and Peterson, he was struck by the police officer with the baton.<sup>8</sup> Plaintiff testified there were two officers holding him down, one holding him and the other striking him with a baton.<sup>9</sup> Plaintiff described the officer that was striking the individual as 5'9"-ish, white, 30s to 40s.<sup>10</sup> Plaintiff testified his attention was really on the officer striking him. The other officer was also white, taller and younger

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<sup>1</sup> NYSCEF Doc. No. 107, page 34, lines 3-15.

<sup>2</sup> NYSCEF Doc. No. 107, page 34, lines 23-25.

<sup>3</sup> NYSCEF Doc. No. 96, pages 15, lines 20-25 to page 16, lines 2-10; NYSCEF Doc. No. 102, page 26, lines 14-20.

<sup>4</sup> NYSCEF Doc. No. 102, page 36, lines 5-8.

<sup>5</sup> NYSCEF Doc. No. 96, page 18, lines 8-9.

<sup>6</sup> NYSCEF Doc. No. 96, page 18, lines 14-19; page 19, lines 11-15; page 22, lines 24-25 to page 23, lines 2-4.

<sup>7</sup> NYSCEF Doc. No. 102, page 34, lines, 7-9.

<sup>8</sup> NYSCEF Doc. No. 96, page 21, lines 18-25; page 23, lines 20-25.

<sup>9</sup> NYSCEF Doc. No. 102, page 33, lines 16-19.

<sup>10</sup> NYSCEF Doc. No. 102, page 27, lines 3-6.

and in the mid-30s.<sup>11</sup> Thereafter, plaintiff turned around and tried to run away from the situation when an officer grabbed him by the ankle and tackled him to the ground.<sup>12</sup>

### Hong's Testimony

Hong testified he recalls a police officer/sergeant (McCann) attempting to place a person (plaintiff) in custody/under arrest and Hong went to assist him.<sup>13</sup> Hong grabbed plaintiff and somehow got dragged forward, fell to the ground and injured both his knees and his body worn camera cut off and broke.<sup>14</sup> The camera hit the ground when he fell forward.<sup>15</sup> Hong was shown his body worn camera footage at deposition.<sup>16</sup> When asked if he saw anything that gave probable cause for detaining plaintiff at the 4:19 and 4:20-ish frame, Hong responded, based on the video so far, he did not see anything that gave probable cause.<sup>17</sup> The footage was played again at the 4:17 frame, wherein plaintiff is standing across from McCann.<sup>18</sup> Hong affirms plaintiff's arms are by his side and there is nothing from that view seems to be threatening towards the officer.<sup>19</sup> Hong affirms McCann points at the plaintiff at the 4:18 frame, McCann uses his left arm to grab plaintiff by his clothing at the 4:19 frame and the baton made contact with plaintiff at the 4:20 frame.<sup>20</sup> Hong testified one of his hands grabbed the plaintiff's clothing at the 4:21 frame.<sup>21</sup> Hong testified he was pushed and fell to the ground and causing the body worn camera to break and the recording

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<sup>11</sup> NYSCEF Doc. No. 102, page 33, lines 22-25 to page 34, lines 1-2.

<sup>12</sup> NYSCEF Doc. No. 96, page 24, lines 9-20; page 25, lines 5-17.

<sup>13</sup> NYSCEF Doc. No. 107, page 38, lines 18-21; pages 43, lines 23-25.

<sup>14</sup> NYSCEF Doc. No. 107, page 38, lines 22-25 and page 44, lines 2-10

<sup>15</sup> NYSCEF Doc. No. 107, page 39, lines 4-11.

<sup>16</sup> NYSCEF Doc. No. 107, page 50, lines 3-5.

<sup>17</sup> NYSCEF Doc. No. 107, page 50, lines 22-25, page 51, 10-14, page 52, lines 4-12.

<sup>18</sup> NYSCEF Doc. No. 107, page 53, lines 10-17.

<sup>19</sup> NYSCEF Doc. No. 107, page 53, lines 18-24 to page 54, line 3.

<sup>20</sup> NYSCEF Doc. No. 107, page 54, lines 4-21.

<sup>21</sup> NYSCEF Doc. No. 107, page 55, lines 5-11.

stopped.<sup>22</sup> Hong testified the video shows the body worn camera falling towards the ground at the very end of the video.<sup>23</sup> Hong reported the damaged body worn camera to the ITB.<sup>24</sup>

### **Body Worn Camera Footage**

The body worn camera footage shows Hong making his way to an officer (McCann) at around the 4:12 frame. The footage shows plaintiff standing and directly facing McCann with his arms relaxed by his side at the 4:17 frame. McCann then grabs and pulls plaintiff towards him at the 4:18 frame and plaintiff swings his left arm at the 4:19 frame. McCann strikes plaintiff with the baton at the 4:20 frame. Thereafter, Hong grabs plaintiff at approximately the 4:21 frame, the footage becomes disoriented and ends at the 4:24 frame.

The Court finds plaintiff's contention that Hong was in the best possible position to intervene, as he observed another officer raise and swing a baton at the plaintiff unpersuasive. Based on the parties' testimonies and Hong's body worn camera footage, there is a lack of evidence demonstrating Hong had reason to know other law enforcement officials, including McCann, committed a constitutional violation since Hong did not observe any prior interaction between plaintiff and McCann and had come into the situation after plaintiff was already standing directly before McCann (*Wilson v City of New York*, 161 AD3d 1212, 1215 [2d Dept 2018]). Thus, Hong would not have known if McCann had probable cause since Hong was not present at the beginning of the McCann and plaintiff interaction. Thus, there is a question as to whether plaintiff committed a crime, if any, and if there was probable cause. Additionally, the Court finds there is a question of fact as to whether plaintiff's swinging of his left arm poses an immediate threat to the safety of the officers or others and whether it constitutes resisting arrest, thereby prompting McCann to

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<sup>22</sup> NYSCEF Doc. No. 107, page 55, lines 18-25 to page 56, lines 2-4.

<sup>23</sup> NYSCEF Doc. No. 107, page 56, lines 18-25 to page 57, lines 2-5.

<sup>24</sup> NYSCEF Doc. No. 107, page 40, lines 13-20.

strike plaintiff with the baton. Therefore, there are triable issues of fact as to the degree of plaintiff's resistance, the threat he posed, and the degree of force Hong used (*Snow v Schreier*, 193 AD3d 1346 [4th Dept 2021]).

Turning to the abuse of process claim and equal protection claim, the Court finds plaintiff merely rehashed the same facts and legal theories previously considered and failed to present any matter of fact or law overlooked or misapprehended by the Court. The Court finds the submitted evidence does not support plaintiff's own conclusive determination that the arrest and detention were pretextual, served a collateral objective, not for any legitimate law enforcement purpose, but to suppress First Amendment-protected activity. Plaintiff ignored the fact plaintiff's own conduct stepping in between an officer and individual and what transpired thereafter lead plaintiff to be detained. The Court further finds "plaintiff failed to show that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law" (*see* CPLR 2221[d][2]; *Garcia v Cali CW Realty Assocs., L.P.*, 230 AD3d 1231, 1232 [2d Dept 2024]).


With respect to the equal protection claim, the plaintiff repeated his earlier arguments and did not demonstrate that the court had overlooked or misapprehended any matter of fact or law in rendering the prior determination (*Peretz v Xu*, 205 AD3d 746, 747 [2d Dept 2022]). Specifically, there is no evidence showing plaintiff was treated differently from similarly situated individuals. Plaintiff did not provide any individual who were in similarly situated circumstances and how plaintiff was treated differently than those similarly situated. Moreover, plaintiff's own testimony and Hong's testimony, couple with Hong's body worn camera demonstrates plaintiff had done more than mere filming of the police, as discussed above. Therefore, the Court did not overlook or misapprehend the defendants' arguments in reaching its original determination (*id*; *see also Vaughn v Veolia Transp., Inc.*, 117 AD3d 939, 940 [2d Dept 2014]).

The parties' remaining contentions, to the extent not expressly set forth herein, have been considered and are denied.

Accordingly, it is hereby

**ORDERED** that plaintiff's motion for reargument (Motion Seq. 8) is granted to the extent as to defendants' motion for summary judgment on the federal excessive force claim and upon reargument vacated as to the federal excessive force claim.

The foregoing constitutes the decision and order of the court.

ENTER  


J.S.C.

**Hon. Lisa Lewis**

KINGS COUNTY CLERK  
FILED  
2026 APR 14 A 9:34