UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH DOONAN, Plaintiff, v. VILLAGE OF SPRING VALLEY, SPRING VALLEY POLICE DEPARTMENT, SGT. JAMES HOENNINGER, P.O. KIMBERLY GRAY, P.O. JOHN DZIEDZIC, P.O. BRENDAN M. DOWLING, P.O. LECH ROSENBAUM, DETECTIVE KEVIN HALLIGAN, and P.O. CHARLES SCHNAARS, Defendants.	**MEMORANDUM DECISION** 10 CV 7139 (VB)

Briccetti, J.:

Plaintiff Joseph Doonan brings this Section 1983 civil rights action, alleging violations of the Fourth Amendment to the United States Constitution, and New York State law.[1] Pending before the Court is defendants' motion for summary judgment. (Doc. #34).

For the following reasons, the motion is GRANTED in part and DENIED in part.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.

BACKGROUND

The parties have submitted briefs, statements of facts, and declarations with supporting exhibits, which reflect the following factual background.

In September 2009, plaintiff lived at 56 Collins Avenue in Spring Valley, New York. On September 28 at approximately 6:30 p.m., plaintiff had a seizure while standing on some steps

[1] In his opposition brief, plaintiff withdraws all claims against defendantsGray, Halligan, and Schnaars. Plaintiff also withdraws his causes of action for conspiracy and for violations of the Fourteenth Amendment. Therefore, those parties and claims are dismissed with prejudice.

just outside his home. Plaintiff had experienced similar seizures in the past. As a result of the seizure, plaintiff fell face-first onto a concrete surface, injuring his head and face. Non-party Maurice Blinn, who also lived in the house, called 911 after he saw plaintiff lying on the concrete, bleeding from his head.

A few minutes later, several police officers, including officers Dziedzic, Dowling, and Rosenbaum, and Sergeant Hoenninger (collectively, the "officers"), arrived at the scene. Upon seeing plaintiff's face "covered with blood," the officers called for an ambulance.

At some point, plaintiff stood up and began walking away from the house. According to the testimony of Blinn and another resident of the house, Ernest Valdez, plaintiff appeared disoriented, as though he did not know where he was.

One or more of the officers approached plaintiff and asked him to stop walking and instead sit down and wait for the ambulance to arrive. Plaintiff did not respond to the officers, and continued walking down the street. Based on plaintiff's appearance and demeanor, the officers treated him as an "emotionally disturbed person."

Blinn and Valdez each witnessed some, but not all, of the interactions between plaintiff and the officers. Valdez testified he saw two officers walking beside plaintiff down the street away from the house. Plaintiff repeatedly said to the officers, "please, I'm alright," at which time one of the officers tased plaintiff, causing plaintiff to yell in pain. Valdez then heard the officer tase plaintiff a second time, and plaintiff yelled again. According to Valdez, plaintiff was not violent or hostile toward the officers, and did not try to resist them in any way.

Blinn testified he saw plaintiff "staggering" down the street accompanied by several police officers. The officers repeatedly told plaintiff to "stop," and indicated they were there "to

help" plaintiff. Blinn then heard (but did not see) plaintiff get tased twice. Like Valdez, Blinn testified plaintiff never became violent or hostile toward the officers.

At their depositions, the officers told a different story. The officers each testified plaintiff continued to walk down the street in an agitated state until he stopped and squatted beside a tree for several seconds. Plaintiff then unexpectedly lunged at the officers, flailing his arms and attempting to kick and spit on the officers. The officers attempted to grab hold of plaintiff, but were unsuccessful. Officer Downing then displayed his taser and told the other officers to stand back because he intended to tase plaintiff. Officer Downing then deployed the taser, and the taser prods struck plaintiff in the chest, knocking him to the ground.

According to the officers, after the five-second electrical charge emitted by the taser dissipated, plaintiff immediately stood up and – with the taser prods still attached to his chest – again lunged at the officers. Officer Downing then pulled the trigger on the taser a second time, emitting another five-second electric shock that again knocked plaintiff to the ground. Plaintiff got up again and pulled the taser prods from his chest. The officers then wrestled plaintiff to the ground as plaintiff continued to try to punch, kick, and spit on the officers. Officer Downing tased plaintiff a third time with his taser in "drive stun" mode, whereby the taser emits an electric shock when directly applied to an individual's body. Officer Rosenbaum also tased plaintiff in this fashion.

The officers finally succeeded in handcuffing plaintiff and subduing him until the ambulance arrived. Plaintiff was not placed under arrest, and he was not charged with committing any crime.

When the ambulance arrived, plaintiff was transported to the hospital, where he was

treated for lacerations and other injuries to his face, a missing tooth and cracked dentures, four broken ribs, and pain in his back, chest, and wrists. Additionally, plaintiff later learned his "spinal stimulator" – an electronic device surgically implanted in plaintiff's back to treat chronic pain – no longer worked.

Plaintiff has very little memory of the incident. He remembers feeling light-headed shortly before he had the seizure; briefly regaining consciousness while lying on his stomach on the ground, at which time he remembers an officer assuring him that the officers were there "to help" him; and regaining consciousness again when he was at the hospital. He did not learn he had been tased until Blinn described the incident to him a day or two later.

DISCUSSION

I. Legal Standard

The Court must grant a motion for summary judgment if the pleadings, discovery materials before the Court, and any affidavits show there is no genuine issue as to any material fact and it is clear the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986).

A fact is material when it "might affect the outcome of the suit under the governing law . . . . Factual disputes that are irrelevant or unnecessary" are not material and thus cannot preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

A dispute regarding a material fact is genuine if there is sufficient evidence upon which a reasonable jury could return a verdict for the non-moving party. See id. The Court "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." Wilson v. Nw. Mut. Ins. Co., 625 F.3d 54, 60 (2d Cir. 2010) (citation omitted). It is the moving

party's burden to establish the absence of any genuine issue of material fact. Zalaski v. City of Bridgeport Police Dep't, 613 F.3d 336, 340 (2d Cir. 2010).

If the non-moving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. at 323. If the non-moving party submits evidence which is "merely colorable," summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. at 249-50. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts, and may not rely on conclusory allegations or unsubstantiated speculation." Brown v. Eli Lilly & Co., 654 F.3d 347, 358 (2d Cir. 2011) (internal citations omitted). The mere existence of a scintilla of evidence in support of the non-moving party's position is likewise insufficient; there must be evidence on which the jury could reasonably find for him. Dawson v. Cnty. of Westchester, 373 F.3d 265, 272 (2d Cir. 2004).

On summary judgment, the Court resolves all ambiguities and draws all permissible factual inferences in favor of the non-moving party. Nagle v. Marron, 663 F.3d 100, 105 (2d Cir. 2011). If there is any evidence from which a reasonable inference could be drawn in favor of the opposing party on the issue on which summary judgment is sought, summary judgment is improper. See Sec. Ins. Co. of Hartford v. Old Dominion Freight Line Inc., 391 F.3d 77, 83 (2d Cir. 2004).

II. Fourth Amendment Claims

A. Excessive Force

Defendants contend they are entitled to summary judgment on plaintiff's excessive force

claim because the undisputed evidence shows plaintiff was not injured as a result of the officers' actions. The Court disagrees.

"The Fourth Amendment prohibits the use of unreasonable and therefore excessive force by a police officer." Tracy v. Freshwater, 623 F.3d 90, 96 (2d Cir. 2010) (citing Graham v. Connor, 490 U.S. 386, 395 (1989)). "The Fourth Amendment test of reasonableness 'is one of objective reasonableness.'" Bryant v. City of N.Y., 404 F.3d 128, 136 (2d Cir. 2005) (quoting Graham v. Connor, 490 U.S. at 399). Therefore, "the inquiry is necessarily case and fact specific and requires balancing the nature and quality of the intrusion on the plaintiff's Fourth Amendment interests against the countervailing governmental interests at stake." Tracy v. Freshwater, 623 F.3d at 96.

Because police officers must often use some degree of force when arresting or otherwise lawfully "seizing" an individual, the Supreme Court has recognized that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." Graham v. Connor, 490 U.S. at 396 (internal quotation marks omitted). Thus, a plaintiff generally must prove that he sustained some injury to prevail on an excessive force claim. McAllister v. N.Y.C. Police Dep't, 49 F. Supp. 2d 688, 699 (S.D.N.Y. 1999); see Landy v. Irizarry, 884 F. Supp. 788, 799 n. 14 (S.D.N.Y. 1995) ("An arrestee must prove some injury, even if insignificant, to prevail in an excessive force claim.").

Here, defendants contend plaintiff cannot demonstrate he was injured as a result of the officers' actions because "the undisputed evidence shows that plaintiff had no awareness of any pain during this incident." (Defs.' Br. at 5).

Although plaintiff may have been in some altered state of consciousness at the time of the

incident, it is undisputed that plaintiff suffered serious injuries, including cuts to his face, a missing tooth, and broken ribs. Additionally, plaintiff's spinal stimulator stopped working after the incident. Even if plaintiff does not know which of his injuries were caused by his initial fall and which were caused by the officers, a reasonable trier of fact could find at least some of plaintiff's injuries resulted from plaintiff's being repeatedly knocked to the ground by a taser and then forced into handcuffs. See Mills v. Fenger, 216 F. App'x 7, 8-9 (2d Cir. 2006) (summary order); Sash v. United States, 674 F. Supp. 2d 531, 539 (S.D.N.Y. 2009). Further, the fact plaintiff "blacked out" during the incident and thus may not have experienced as much pain as he otherwise might have is relevant to plaintiff's damages, not to whether he suffered an injury. Id.

In sum, viewing the record in the light most favorable to plaintiff, there are material issues of fact as to (1) whether the officers' use of force was reasonable under the circumstances, and (2) whether the officers caused any or all of plaintiff's injuries. Therefore, defendants' motion for summary judgment on plaintiff's excessive force claim is denied.

B. Unlawful Seizure

Defendants also seek summary judgment on plaintiff's unlawful seizure claim on the ground that plaintiff was never "seized" for purposes of the Fourth Amendment.

"[T]he first step in any Fourth Amendment claim (or, as in this case, any section 1983 claim predicated on the Fourth Amendment) is to determine whether there has been a constitutionally cognizable seizure." Medeiros v. O'Connell, 150 F.3d 164, 167 (2d Cir. 1998). A "seizure" occurs when police detain an individual under circumstances in which a reasonable person would believe he or she is not at liberty to leave. United States v. Mendenhall, 446 U.S. 544, 554 (1980). "Examples of circumstances that might indicate a seizure, even where the

person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Id.

Here, a reasonable trier of fact could determine plaintiff was "seized" for purposes of the Fourth Amendment. In fact, most of the circumstances identified in Mendenhall as being indicative of a seizure occurred in this case. Plaintiff was surrounded by several police officers (at least two of whom were brandishing tasers), was subsequently tased by the officers at least four times, was wrestled to the ground, and was placed in handcuffs. A reasonable person could certainly believe he was not free to leave under those circumstances. Id.

Of course, a material issue of fact also exists as to whether the seizure was nevertheless lawful because the officers' actions were reasonable under the circumstances. See Lauro v. Charles, 219 F.3d 202, 209 (2d Cir. 2000). Although Blinn and Valdez testified plaintiff never became combative or threatening to the officers, the officers testified plaintiff attempted to punch, kick, and spit on them, and plaintiff was thus detained for his own safety and the safety of the officers.

Therefore, material issues of fact preclude summary judgment on plaintiff's unlawful seizure claim.

C. Qualified Immunity

Defendants further contend that even if the officers violated plaintiff's Fourth Amendment rights, they are entitled to qualified immunity. Qualified immunity shields government officials whose conduct "does not violate clearly established statutory or

constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The scope of qualified immunity is broad, and it protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). "A qualified immunity defense is established if (a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law." Tierney v. Davidson, 133 F.3d 189, 196 (2d Cir. 1998) (internal quotation marks omitted).

Here, material issues of fact preclude summary judgment on defendants' qualified immunity defense. Viewing the record in the light most favorable to plaintiff, a reasonable trier of fact could find: (1) the officers violated clearly established law by depriving plaintiff of his constitutional right to be free from the use of excessive force and from unlawfully being seized, and (2) it was not objectively reasonable for the officers to believe their actions did not violate the law. See Tracy v. Freshwater, 623 F.3d at 96; United States v. Mendenhall, 446 U.S. at 554.

Therefore, defendants' motion for summary judgment on their qualified immunity defense is denied.

D. Monell Claim

Defendants also seek summary judgment on plaintiff's claims against the Village of Spring Valley because plaintiff cannot, as a matter of law, prove liability under Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

A municipality is liable for a deprivation of a citizen's rights pursuant to 42 U.S.C. § 1983 "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."

Id. at 694. A municipality may be held liable for inadequate training, supervision, or hiring where the failure to train, hire, or supervise amounts to deliberate indifference to the rights of those with whom municipal employees will come into contact. City of Canton v. Harris, 489 U.S. 378, 388 (1989).

Here, viewing the record in the light most favorable to plaintiff, there is insufficient evidence to support a Monell claim. It is undisputed that each officer received extensive training, including annual training in the use of tasers. There is no evidence in the record that the Village inadequately trained, supervised, or hired the officers, or that the officers violated plaintiff's rights pursuant to an official policy or custom. Therefore, the Village's motion for summary judgment on plaintiff's Monell claim is granted. Id.

III. State Law Claims

Defendants also seek summary judgment on plaintiff's state law claims for negligence and assault and battery. Defendants contend (1) there is insufficient evidence in the record to support a negligence claim against either the officers or the Village, and (2) plaintiff failed properly to allege a cause of action for assault and battery in his notice of claim.

With respect to plaintiff's negligence claim, under New York law, an intentional harmful or offensive contact renders "the actor . . . liable for assault and not negligence, even when the physical injuries may have been inflicted inadvertently." Mazzaferro v. Albany Motel Enterprises, Inc., 127 A.D.2d 374, 376 (3d Dep't 1987) (citing Trott v. Merit Dep't Store, 106 A.D.2d 158, 160 (1st Dep't 1985). Therefore, defendants' motion for summary judgment on plaintiff's negligence claim against the officers is granted.

To the extent plaintiff alleges the Village negligently hired, trained, or supervised the

officers, defendants are entitled to summary judgment for the same reasons they are entitled to summary judgment on plaintiff's Monell claim.

With respect to plaintiff's assault and battery claim, the Court finds plaintiff sufficiently alleged that cause of action against the officers in his notice of claim. See N.Y. Gen. Mun. Law. § 50-e. In any event, even if the notice of claim was deficient in some respect, the Court would disregard such deficiency because defendants would not be prejudiced as a result. Id. § 50-e(6) ("[A] mistake, omission, irregularity or defect made in good faith in the notice of claim . . . may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby."). Therefore, defendants' motion for summary judgment on plaintiff's assault and battery claim is denied.

IV. Punitive Damages

Finally, defendants' seek summary judgment on plaintiff's claim for punitive damages. Viewing the record in the light most favorable to plaintiff, a reasonable trier of fact could find one or more of the officers acted with "reckless or callous indifference" to plaintiff's rights. Lee v. Edwards, 101 F.3d 805, 808 (2d Cir. 1996). Therefore, defendants' motion to dismiss plaintiff's punitive damages claim is denied.

CONCLUSION

Defendants' motion for summary judgment (Doc. #34) is GRANTED in part and DENIED in part.

Counsel are directed to submit a Joint Pretrial Order in accordance with the Court's Individual Practices by July 25, 2013, and to appear for a pretrial conference on August 1, 2013, at 12:30 p.m.

Dated: June 25, 2013
White Plains, NY

SO ORDERED

Vincent L. Briccetti
United States District Judge