UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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OLGA NEGRON, as Administratrix of the Estate Of IMAN MORALES, Deceased and OLGA NEGRON, Individually,

Plaintiff,

- against -

THE CITY OF NEW YORK, P.O. NICHOLAS MARCHESONA (Tax Reg. #921535), and Administrator of the Estate of LT. MICHAEL W. PIGOTT (Shield # unknown), Deceased,

Defendants.

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MEMORANDUM & ORDER

09-CV-944 (SLT) (JO)

TOWNES, United States District Judge:

On February 24, 2009, Plaintiff Olga Negron, as administratrix of her deceased son's estate and individually, commenced this action in the Supreme Court of the State of New York, Kings County, against the City of New York (the "City"), police officer Nicholas Marchesona ("Officer Marchesona"), and the administrator of deceased lieutenant Michael W. Pigott's estate ("Lt. Pigott") (collectively, "Defendants"), pursuant to 42 U.S.C. § 1983 and state law. The City thereafter removed the action to federal court. The case arises from an incident in which Iman Morales, Plaintiff's son, fell from an elevated surface and died after an officer tasered him. Defendants now move to dismiss the action pursuant to Federal Rules of Civil Procedure 12(c) and 12(b)(1) or, in the alternative, Rule 56. For the reasons set forth below, Defendants' motions are denied in part and granted in part.

I. BACKGROUND

A. Facts

The following facts are drawn from Plaintiff's complaint and are assumed to be true for purposes of this decision.

On September 24, 2008, Morales was in a building located at 489 Tompkins Avenue in Brooklyn, NY. (Compl. ¶ 18). Officer Marchesona and Lt. Pigott were present in the vicinity of the building in their capacities as police officers for the City. (Compl. ¶¶ 19, 20). Lt. Pigott issued an order to use a taser on Morales, and Officer Marchesona did so without warning and not as a "last resort." (Compl. ¶¶ 24, 26, 27). As a result of being tasered while on an elevated surface, Morales fell and ultimately died. (Compl. ¶¶ 29, 32, 34). Plaintiff alleges that Morales posed no threat of imminent death or serious injury to the officers or others, had not committed any illegal act either before or at the time he was tasered, and "did not possess a weapon of any kind during the incident." (Compl. ¶¶ 31, 33, 49). Plaintiff contends that the City failed to "take[] any steps" or "ma[k]e any efforts to halt this course of conduct, to make redress to the plaintiff or other citizens injured thereby," or take disciplinary action against their employees or agents. (Compl. ¶ 42). Plaintiff also alleges that the City "failed to properly regulate and promulgate appropriate and reasonable rules concerning officer's use of tasers including but not limited to defining when an officer may use a taser." (Compl. ¶ 16). Plaintiff claims, individually, that she has sustained damages based upon the deprivation of the love, companionship, and services of her son, and because she was "compelled to witness" the death of her son. (Compl. ¶ 87).

B. Procedural History

Plaintiff filed her complaint in New York State Supreme Court, Kings County, on February 24, 2009, and the City removed it to this Court pursuant to 28 U.S.C. § 1441 on March

6, 2009. (Docket No. 1). Plaintiff alleges seven causes of action, the first five on behalf of her son: (1) violation of the Fourth and Fourteenth Amendments under § 1983; (2) negligence; (3) loss of enjoyment of life; (4)[1] assault and battery; (5) wrongful death; (6) loss of consortium; and (7) negligent infliction of emotional distress.

On April 1, 2010, Magistrate Judge Steven M. Gold ruled, in part, that if Defendants moved to dismiss on grounds of qualified immunity, all discovery except for document demands and production would be stayed. (Docket entry at Apr. 7, 2010). On May 20, 2010, the Court granted Defendants leave to file motions to dismiss the complaint, and the motions were fully briefed on November 10, 2010. (Docket No. 51). On February 16, 2012, Judge Gold denied Plaintiff's motion to lift the stay pending the outcome of these motions. (Docket No. 62).

The City and Officer Marchesona move to dismiss the action pursuant to Federal Rule of Civil Procedure 12(c) on the grounds that (1) Officer Marchesona is entitled to qualified immunity; (2) Plaintiff fails to state a claim for municipal liability against the City; and (3) the Court should decline to exercise supplemental jurisdiction over state law claims, if they are not otherwise dismissed on the merits. (City Mem. at 1). The City moves, in the alternative, for summary judgment. Lt. Pigott's estate, which joins in the City's brief, also argues that the complaint should be dismissed pursuant to Rule 12(b)(1) because Lt. Pigott's actions were objectively reasonable, his order was not in violation of police rules regarding taser use, and he is entitled to qualified immunity.

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[1] Plaintiff mistakenly uses the heading "Fourth Cause of Action" for both the assault and battery claim and the wrongful death claim. (Compl. at 13).

II. STANDARD OF REVIEW

The standard for evaluating a motion to dismiss pursuant to Rule 12(c) is the same as that for Rule 12(b)(6). Karedes v. Ackerley Group, Inc., 423 F.3d 107, 113 (2d Cir. 2005). In this context, a court must accept all factual allegations in the complaint as true, and draw all reasonable inferences in the plaintiff's favor. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56 (2007). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009). To survive a motion to dismiss, a complaint must allege sufficient facts "to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 569. If a party has not "nudged [her] claims across the line from conceivable to plausible, the complaint must be dismissed." Id. at 570.

Additionally, a court deciding a 12(b)(6) motion is confined to "the allegations contained within the four corners of [the] complaint," Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 71 (2d Cir. 1998), including documents attached to the complaint or incorporated by reference, and documents a plaintiff has relied upon in bringing suit, Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002). If a court considers matters beyond this scope, "the motion must be treated as one for summary judgment under Rule 56 . . . [and] [a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). In this case, discovery was stayed quite early in the litigation. Given the lack of admissible evidence at this point, the Court will not convert the instant motions to ones for summary judgment and will not consider the materials attached to the parties' motion papers.

III. DISCUSSION

A. Federal Claim

Plaintiff brings this action pursuant to 42 U.S.C. §1983, alleging violation of her deceased son's rights under the Fourth and Fourteenth Amendments of the United States Constitution. Section 1983 "creates no substantive rights," but provides "a procedure for redress for the deprivation of rights established elsewhere." Sykes v. James, 13 F.3d 515, 519 (2d Cir. 1993). In order to maintain a § 1983 action, a plaintiff must allege that the conduct complained of (1) was "committed by a person acting under color of state law" and; (2) "deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Pitchell v. Callan, 13 F.3d 545, 547 (2d Cir. 1994). Moreover, "[i]t is well settled in this Circuit that 'personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.'" Farrell v. Burke, 449 F.3d 470, 484 (2d Cir. 2006) (quoting Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994)). A plaintiff cannot base a defendant's liability on respondeat superior or on "linkage in the . . . chain of command." Hernandez v. Keane, 341 F.3d 137, 144 (2d Cir. 2003).

In this case, Plaintiff has alleged that the individual defendants, acting under color of state law and with personal involvement, deprived Morales of his right to be free from excessive force under the Fourth Amendment, and violated the "rights, privileges, and immunities" guaranteed him under the Fourteenth Amendment by detaining him even though he was "wholly innocent." (Compl. ¶¶ 35, 36).

1. § 1983 Excessive Force

The Fourteenth Amendment's due process clause provides that no person shall be deprived of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The intent is to prevent government officials "from abusing [their] power, or employing it as an

instrument of oppression." Bryant v. City of New York, 404 F.3d 128, 135 (2d Cir. 2005) (bracketing in original) (quoting Collins v. City of Harker Heights, Tex., 503 U.S. 115, 126 (1992)). Nevertheless, the Supreme Court has made clear that:

> all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach . . . [b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct.

Graham v. Connor, 490 U.S. 386, 395 (1989) (emphasis in original); see Bryant, 404 F.3d at 135-36. Accordingly, the Court will address Plaintiff's excessive force claim only under the Fourth Amendment, which prohibits "government's use of excessive force when detaining or arresting individuals." Jones v. Parmley, 465 F.3d 46, 61 (2d Cir. 2006). The question in this context is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Graham, 490 U.S. at 397.

Though the complaint admittedly offers a limited amount of information, Plaintiff does allege that Lt. Pigott ordered Officer Marchesona to use a taser on Morales while he was unarmed, on an elevated surface, had committed no crime, and posed no threat of imminent death or serious injury to the officers or others. Assuming all of these facts to be true, Plaintiff has met the plausibility standard for the excessive force claim, having provided some basis for the claim and not merely "conclusory allegations." Giaccio v. City of New York, No. 04 Civ. 3652, 2005 WL 95733, at *5 (S.D.N.Y. Jan. 19, 2005).

2. Qualified Immunity

Yet, even if the officers used excessive force against Morales, they could still enjoy immunity from suit. Government officials are protected from civil liability under the doctrine of

qualified immunity when their 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). On a motion to dismiss, "[t]he initial question with respect to qualified immunity is whether, viewing the facts alleged in the light most favorable to the plaintiff, there was a constitutional violation." Fierro v. City of New York, 341 Fed. Appx. 696, 698 (2d Cir. 2009) (citing Clubside, Inc. v. Valentin, 468 F.3d 144, 152 (2d Cir. 2006)). "If the answer to that question is yes, then the Court must determine if that right was clearly established at the time the challenged decision was made, and whether the defendants' actions were objectively unreasonable." Id. (citing Harhay v. Town of Ellington Bd. of Educ., 323 F.3d 206, 211 (2d Cir. 2003)). The test of reasonableness is met "if officers of reasonable competence could disagree on the legality of the defendant's actions." Thomas v. Roach, 165 F.3d 137, 143 (2d Cir. 1999) (internal quotation marks removed).

Although the Court is mindful that the issue of qualified immunity should be decided "at the earliest possible stage in litigation," Castro v. United States, 34 F.3d 106, 112 (2d Cir. 1994), when it is presented in a Rule 12(b)(6)[2] motion, "'the defense faces a formidable hurdle' . . . and is usually not successful," Field Day, LLC v. County of Suffolk, 463 F.3d 167, 191-92 (2d Cir. 2006) (quoting McKenna v. Wright, 386 F.3d 432, 434 (2d Cir. 2004)). For not only must facts supporting qualified immunity "appear on the face of the complaint," but the plaintiff is "entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense." McKenna, 386 F.3d at 436. In this case, having found the allegation of a constitutional violation plausible under the Rule 12(b)(6) standard, the question is whether the complaint, on its face, offers facts showing that the officers' actions

[2] This assessment is "equally applicable to the procedural context . . . [of] a Rule 12(c) motion for judgment on the pleadings." Cohn v. New Paltz Cent. School Dist., 171 Fed. Appx. 877, 879 (2d Cir. 2006).

would meet the reasonability test. It does not. The circumstances surrounding Morales' actions and precarious perch, the challenges facing officers at the scene, and the resulting order to use the taser on Morales have not been illuminated at this point in the litigation. Additionally, Plaintiff specifically alleges that the defendants "unreasonably . . . departed from ordinary care in using a taser" on Morales when they were in a position to know that he "could fall from an elevated surface." (Compl. ¶¶ 29, 33). Under the "more stringent standard applicable to this procedural route," Pendleton v. Goord, 849 F. Supp. 2d 324, 332 (E.D.N.Y. 2012) (quoting McKenna, 386 F.3d at 436), Defendants' motions to dismiss the complaint on qualified immunity grounds are denied.

3. Municipal Liability

The City argues that the § 1983 claim should be dismissed against it because Plaintiff has failed sufficiently to allege that the constitutional violation was due to a municipal policy or custom. Under Monell v. Dep't of Social Svs., 436 U.S. 658 (1978), "a municipality can be held liable under Section 1983 if the deprivation of the plaintiff's rights under federal law is caused by a governmental custom, policy, or usage of the municipality." Jones v. Town of East Haven, 691 F.3d 72, 80 (2d Cir. 2012) (citing Monell, 436 U.S. at 690-91). Municipalities cannot be liable for the torts of their employees under a theory of respondeat superior. Bd. of County Comm'rs of Bryan County, Okla. v. Brown, 520 U.S. 397, 403 (1997). Moreover, "isolated acts of excessive force by non-policymaking municipal employees" typically are insufficient to show the existence of a policy or custom that would incur municipal liability. Jones, 691 F.3d at 81 (2d Cir. 2012); see City of Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985).

To plead the existence of a policy or custom, or usage adequately, a plaintiff must allege:

> (1) the existence of a formal policy which is officially endorsed by the municipality; (2) actions taken or decisions made by municipal officials with final decision making authority, which caused the alleged violation of plaintiff's civil

> rights; (3) a practice so persistent and widespread that it constitutes a custom of which constructive knowledge can be implied on the part of the policymaking officials; or (4) a failure by policymakers to properly train or supervise their subordinates, amounting to 'deliberate indifference' to the rights of those who come in contact with the municipal employees.

McCrary v. County of Nassau, 493 F. Supp. 2d 581, 588 (E.D.N.Y. 2007) (citing Moray v. City of Yonkers, 924 F. Supp. 8, 12 (S.D.N.Y. 1996)) (emphasis added). It is not enough to assert that a municipality has a custom or policy of violating constitutional rights "in the absence of allegations of fact tending to support, at least circumstantially, such an inference." Davis v. Lynbrook Police Dept., 224 F. Supp. 2d 463, 478 (E.D.N.Y. 2002) (quoting Dwares v. City of New York, 985 F.2d 94, 100 (2d Cir. 1993)). Moreover, while municipal liability may be premised on a failure to train employees, such a failure must "reflect[] deliberate indifference to . . . constitutional rights." Okin v. Village of Cornwall-On-Hudson Police Dept., 577 F.3d 415, 440 (2d Cir. 2009) (quoting City of Canton v. Harris, 489 U.S. 378, 392 (1989)). To establish deliberate indifference, a plaintiff must show: (1) "that a policymaker knows 'to a moral certainty' that her employees will confront a given situation"; (2) "that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation"; and (3) "that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights." Walker v. City of New York, 974 F.2d 293, 297-98 (2d Cir. 1992).

In this case, Plaintiff alleges that the City "failed to competently and sufficiently hire, train, and retain" officers "to conform and conduct themselves to a statute established by law for the protection of citizens" and "to properly regulate and promulgate appropriate and reasonable rules concerning officer's use of tasers including but not limited to defining when an officer may use a taser." (Compl. ¶¶ 15. 16). Defendants argue that these allegations are "conclusory" and the City should not be subject to municipal liability. The Court agrees. Plaintiff has not alleged

the existence of a formal policy, actions taken by officials with final decision making authority, or a widespread practice. To the extent that she appears to assert failure in training, Plaintiff has not sufficiently alleged facts to support a theory of deliberate indifference. Accordingly, the § 1983 claim is dismissed as against the City.

B. State Law Claims

Defendants also seek to dismiss two of Plaintiff's state law claims: (1) assault and battery; and (2) negligent infliction of emotional distress ("NIED"). As to the first, Defendants' motions are denied because "[t]he same standard is used to evaluate claims of assault and battery under New York law and of excessive force under the Fourth Amendment," Biggs v. City of New York, No. 08 Civ. 8123, 2010 WL 4628360, at *8 (S.D.N.Y. Nov. 16, 2010) (citing Posr v. Doherty, 944 F.2d 91, 94-95 (2d Cir. 1991)), and the Court has already found that Plaintiff's complaint states a plausible claim for excessive force.

As to the second, Plaintiff has alleged that she was "thrust" into a "zone of danger" by Defendants where she was "compelled to witness her son being abused" when the taser was used on him, "causing him to sustain a wrongful death." (Compl. ¶¶ 86, 87). Plaintiff asserts that these allegations are sufficient to establish a claim for NIED. As Defendants correctly argue, however, "[u]nder New York law, a party may only recover for emotional damage resulting from witnessing an injury to an immediate family member if the alleged negligent act simultaneously exposes both the injured party and the plaintiff to an unreasonable risk of bodily injury or death." Erony v. Alza Corp., 913 F. Supp. 195, 201 (S.D.N.Y. 1995) (emphasis added). The "zone of danger" theory is premised on the idea that while Plaintiff was not necessarily injured, she was at physical risk herself when she witnessed harm to her immediate family member. See Rivera v. Leto, 04-CV-7072, 2008 WL 5062103, at *7 (S.D.N.Y. Nov. 25, 2008) (quoting Bovsun v. Sanperi, 61 N.Y.2d 219, 230-31 (1984)); Abbatiello v. Monsanto Co., 522 F. Supp. 2d 524, 535

(S.D.N.Y. 2007) (same). In this case, Plaintiff has not alleged in her complaint that she feared for her own safety or was exposed to a risk of physical harm beyond reciting the phrase "zone of harm." Accordingly, Plaintiff's claim for NIED is dismissed.

IV. CONCLUSION

For the reasons set forth above, Defendants' motions to dismiss (Docket Nos. 51, 53) are DENIED as to qualified immunity, but are GRANTED in the following respects: (1) Plaintiff's § 1983 claim is dismissed only insofar as it invokes due process under the Fourteenth Amendment; (2) Plaintiff's § 1983 claim is dismissed as against the City; and (3) Plaintiff's state law claim for negligent infliction of emotional distress is dismissed. Accordingly, Plaintiff's § 1983 claim for excessive force under the Fourth Amendment survives, as do her remaining state law claims. The parties are directed to contact Judge Gold's Chambers within seven days of the date of this order to schedule a conference.

SO ORDERED.

s/ SLT

SANDRA L. TOWNES
United States District Judge

Dated: October 19, 2012
Brooklyn, New York