UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Darryl Greenfield,
Plaintiff,
vs.
Police Officers David Tomaine,
Michael Barbagallo and John Doe,
Defendants.

09 Civ 8102 (CS)(PED)
2011 U.S. Dist. Lexis 74697

May 10, 2011, Decided
May 10, 2011, Filed

Paul E. Davison, United States Magistrate Judge.

REPORT AND RECOMMENDATION
TO: THE HONORABLE CATHY SEIBEL,
UNITED STATES DISTRICT JUDGE

Plaintiff Darryl Greenfield ("Plaintiff"), incarcerated at the Oneida Correctional Facility and proceeding pro se, brings the instant action against Poughkeepsie, New York police officers David Tomaine ("Tomaine"), Michael Barbagallo ("Barbagallo"), and John Doe (collectively, "Defendants") pursuant to 42 U.S.C. § 1983. Docket # 2 (Complaint ("Compl.")). Plaintiff seeks to recover damages for injuries he claims to have sustained when Defendants employed the use of a taser while placing him under arrest on May 19, 2009.

On December 22, 2009, Defendants filed an answer to the Complaint. Docket # 9 (Answer). Having conducted discovery in this matter, Defendants now move to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), or alternatively, for summary judgment pursuant to Federal Rule of Civil Procedure 56. Docket # 20 (Motion to Dismiss).1 Defendants argue (1) that summary judgment is appropriate because their conduct was reasonable as a matter of law; (2) that Defendants are protected from liability under the doctrine of qualified immunity; and (3) that a finding of liability in the present action would imply the invalidity of Plaintiff's criminal conviction for the conduct that was the subject of his arrest. Docket # 21 (Memorandum of Law in Support of Dismissal or Summary Judgment (the "Motion")). On or around March 3, 2011, Plaintiff served a response on the Defendants, but the Court's Pro Se Office did not receive a copy of the response until March 24, 2011, and it was docketed on March 30, 2011. Docket ## 22-24 (the "Response"). On March 28, 2011, Defendants filed a reply in further support of the Motion. Docket # 25 (the "Reply"). The Court heard oral argument on May 9, 2011.

For the reasons set forth below, I respectfully recommend that the Motion be GRANTED IN PART and DENIED IN PART.

I. The Summary Judgment Record

A party moving for summary judgment in this district must submit along with its other motion papers a separate statement of numbered material facts "as to which the moving party contends there is no genuine issue to be tried." Local Rule 56.1(a) ("Rule 56.1 Statement"). The opposing party is required to submit a counterstatement responding to each numbered paragraph in the moving party's statement, and any additional paragraphs setting forth other material facts as to which the opposing party contends there is a genuine issue to be tried ("Counterstatement"). Id. As a general rule, "all material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." Local Civil Rule 56.1(c).

Although Defendants filed a Rule 56.1 Statement along with their Motion, Plaintiff did not file a Counterstatement. However, Plaintiff's Opposition Affidavit and Response Memorandum controvert several material factual assertions made in Defendants' Rule 56.1 Statement. The Court has discretion to "conduct an assiduous review of the record even [though Plaintiff] has failed to file [a Rule 56.1] statement." Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 73 (2d Cir. 2001) (internal quotation marks omitted). "Thus, plaintiff's failure to file a proper Counterstatement neither forecloses this Court from considering facts not presented in defendants' Rule 56.1 Statement, nor compels the Court to accept the factual assertions in defendants' Rule 56.1 Statement as true without examining the parties' supporting evidence." Goldman v. Admin for Children's Servs., 04 Civ. 7890 (GEL), 2007 U.S. Dist. Lexis 39102, *2 (S.D.N.Y. May 28, 2007). 2

In light of Plaintiff's pro se status, the Court has conducted a review of the entire record before it, see Graham v. Lewinski, 848 F.2d 342, 344 (2d Cir. 1988) ("[S]pecial solicitude should be afforded pro se litigants generally, when confronted with motions for summary judgment."), including the factual assertions contained in Plaintiff's Opposition Affirmation and Response Memorandum, in addition to Plaintiff's entire deposition transcript (attached as an exhibit to Defendant's Rule 56.1 Statement). "As a result, the undisputed facts that are admitted for the purposes of this motion have been gleaned from an examination of the testimony and supporting evidence presented by both plaintiff and defendants." Goldman, 04 Civ. 7890 (GEL), 2007 U.S. Dist. Lexis 39102, at *2.

II. Background

On the evening of May 19, 2009, while at his aunt's home in Poughkeepsie, New York, Plaintiff had a verbal altercation with his aunt. Following that altercation, Plaintiff's aunt contacted police to report threats Plaintiff had made to her. In response to that call, Defendants entered the house and found Plaintiff in the basement brandishing a knife. Defendants ordered Plaintiff to drop the knife, but Plaintiff did not do so. Instead, Plaintiff advanced towards the officers while still holding the knife, causing Tomaine to deploy a taser in order to stop Plaintiff's advance, hitting him in the chest. After being hit in the chest with the taser, Plaintiff dropped the knife and claims to have "stood there shaking for at least three to four minutes" before falling to the ground - a factual assertion that Defendants dispute. Defendants claim that Plaintiff "continued to struggle" - a factual assertion that Plaintiff disputes - and that Tomaine therefore deployed an additional

cycle of the Taser to Plaintiff's "chin and neck area" in order to "subdue" and handcuff him. While Tomaine was applying the second cycle of the taser, Plaintiff claims that "the officers" stated: "Look at that black nigger, jumping like a fish out of water." Defendants then removed Plaintiff from the premises and placed him under arrest on the charge of menacing a police officer in violation of New York Penal Law § 120.18.

On September 23, 2009, following his arrest but prior to his conviction, Plaintiff initiated the instant action, asserting a claim under 42 U.S.C. § 1983 based upon Tomaine's use of the taser in connection with the arrest. Docket # 2 (Complaint). Plaintiff subsequently pleaded guilty, before the Dutchess County Court, to the charge of menacing a police officer. As part of that plea, Plaintiff admitted to "brandishing or threatening" Defendants with a knife while knowing that they were attempting to perform their duties as police officers. Plaintiff is currently serving his sentence in connection with that conviction.

III. Discussion

A. Legal Standard

A district court may grant summary judgment only if the evidence, viewed in the light most favorable to the party opposing the motion, presents no genuine issue of material fact, Samuels v. Mockry, 77 F.3d 34, 35 (2d Cir. 1996), and the movant is entitled to judgment as a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine issue of material fact exists if "a reasonable jury could return a verdict for the nonmoving party." Vann v. City of New York, 72 F.3d 1040 (2d Cir. 1995). Although the "court must not weigh the proffered evidence or assess the credibility of potential witnesses" on a motion for summary judgment, Gomez v. Pellicone, 986 F. Supp. 220, 225 (S.D.N.Y. 1997), the Court must resolve all ambiguities and draw all reasonable inferences in the light most favorable to the party opposing the motion. See Quaratino v. Tiffany & Co., 71 F.3d 58, 64 (2d Cir. 1995).

Mere conclusory allegations, speculation or conjecture will not avail a party resisting summary judgment. Kulak v. City of New York, 88 F.3d 63, 71 (2d Cir. 1996). If there is evidence in the record as to any material fact from which an inference could be drawn in favor of the non-movant, then summary judgment is unavailable. Holt v. KMI-Continental, Inc., 95 F.3d 123, 128 (2d Cir. 1996), cert. denied, 520 U.S. 1228, 117 S. Ct. 1819, 137 L. Ed. 2d 1027 (1997). To this end, the district court is charged under Rule 56 with the function of "issue finding," and not "issue resolution." Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1224 (2d Cir. 1994).

B. Excessive Force and Qualified Immunity

Plaintiff argues that Defendants used excessive force during the events that led to his arrest. Defendants argue that the force they used to subdue Plaintiff was not excessive. Defendants also argue that they are shielded from liability by qualified immunity, as it was objectively reasonable for them to believe, in the exigency of the moment, that the force they used did not violate Plaintiff's rights.

The Fourth Amendment protects against the use of excessive force by the police during an arrest. "When determining whether police officers have employed excessive force in the arrest context, . . . courts should examine whether the use of force is objectively unreasonable in light of the facts and circumstances confronting them, without regard to [the officers'] underlying intent or motivation."' Papineau v. Parmley, 465 F.3d, 46, 61 (2d Cir. 2006) (quoting Graham v. Connor, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). Whether police conduct is objectively reasonable under the Fourth Amendment "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." Graham, 490 U.S. at 394 (quoting Tennessee v. Garner, 471 U.S. 1, 8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)). Excessive force claims must be analyzed under the totality of the circumstances, "including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of others and whether he is actively resisting arrest." Sullivan v. Gagnier, 225 F.3d 161, 165 (2d Cir. 2000) (citations omitted). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham, 490 U.S. at 396. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." Id. at 396-97.

Even if Defendants used excessive force in their arrest of Plaintiff, they would still escape liability if their actions are shielded by qualified immunity. "[P]olice officers are entitled to qualified immunity if (1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights." Oliveira v. Mayer, 23 F.3d 642, 648 (2d Cir. 1994). "The objective reasonableness test is met - and the defendant is entitled to immunity - 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 citations and quotations omitted).

Although immunity should ordinarily be decided by the court, jury consideration is required in those cases where there are material disputes of fact as to the availability of the defense. See Oliveira, 23 F.3d at 649 (internal quotations and citations omitted). The Supreme Court has noted that qualified immunity entitles public officials to "an immunity from suit rather than a mere defense to liability . . . [and thus] it is effectively lost if a case is erroneously permitted to go to trial." Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Thus, the Supreme Court "repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Pearson v. Callahan, 555 U.S. 223, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009) (internal quotations omitted).

Here, it is undisputed that Defendants were summoned to the home of Plaintiff's aunt, at night, in response to a report that Plaintiff, who had been drinking alcohol since noon, was being hostile towards other residents of the home. Rule 56.1 Statement ¶ 3 and Ex. B (Greenfield Depo. Tr., at 12). It is undisputed that Plaintiff brandished a knife and advanced toward Defendants when they entered his aunt's basement, and that Plaintiff did not comply with Defendants' instructions to drop the knife. Id. at ¶¶ 5-6. 3 Under these circumstances, the Court has no trouble concluding, as a matter of law, that Tomaine's initial use of the taser was a reasonable application of force,

made in response to an immediate threat of potentially serious physical harm. Because no reasonable jury could conclude otherwise, Plaintiff's claim of excessive force must be dismissed to the extent it is predicated upon Tomaine's initial application of the taser. See, e.g., U.S. ex rel. Thompson v. Village of Spring Valley, N.Y., 05 Civ. 2005 (LAP), 2006 U.S. Dist. Lexis 46356, *4 (S.D.N.Y. July 10, 2006) (Preska, J.) (finding that it was objectively reasonable for police officer to use taser to subdue suspect who was resisting arrest).

Whether summary judgment should be granted with respect to Tomaine's second application of the taser is a separate matter. During his deposition, Plaintiff testified that, after being hit with the initial shot from the taser, he dropped the knife and then "stood there shaking for at least three to four minutes" before falling to the ground, at which point he "felt another hit in his throat," a reference to the second shot from the taser. Rule 56.1 Statement, Ex. B (Greenfield Depo. Tr., at 16). Defendants do not dispute that they had successfully "secured" the knife or that Plaintiff was lying on the ground at the time Tomaine fired the second shot from the taser. See Docket # 20 (Memorandum of Law ("MOL"), at 2); Rule 56.1 Statement, Ex. B (Greenfield Depo. Tr., at 17) and Ex. C (Tomaine "Affidavit"). Instead, Defendants' Rule 56.1 Statement merely states, without elaboration, that Plaintiff "continued to struggle" after the initial shot from the taser - an assertion that Plaintiff disputes. Compare Rule 56.1 Statement ¶ 7 with Affirmation in Opposition ("Opp'n Aff.") ¶ 5 and Response Memorandum of Law ("Response Memo."), at 9. Defendants have presented no evidence to indicate what the alleged "struggle" entailed, how long that "struggle" lasted, 4 or whether Plaintiff's "struggle" was merely an adverse, and perhaps involuntary, reaction to being hit in the chest with a taser. 5 By contrast, Plaintiff claims that "after the first shot of the taser, . . . he fell to the ground . . . [and] was unable to, and did not in any way struggle . . . ." Response Memo., at 9.

The fact that Plaintiff initially resisted arrest, and even threatened Defendants with physical harm before being tased in the first instance, "does not give [Defendants] license to use force without limit." Sullivan, 225 F.3d at 166. "The force used by the officer must be reasonably related to the nature of the resistance and the force used, threatened, or reasonably perceived to be threatened, against the officer." Id. Here, given Plaintiff's testimony (1) that he "stood there shaking" for a number of minutes after being tased in the first instance, (2) that he had been lying on the ground when Tomaine applied the taser a second time, and (3) that Defendants were laughing and joking during the incident, 6 coupled with (4) Defendants' admission that they had, by that time, "secured" the knife in question, the Court cannot conclude that Tomanie's second application of the taser was objectively reasonable as a matter of law. Indeed, the reasonableness of Tomaine's second application of the taser constitutes a genuine issue of material fact that should be resolved by a jury at trial, and not by the Court on a Rule 56 motion. Holt, 95 F.3d at 128.

My recommendation here is analogous to the result recently reached by the Second Circuit in the case of Tracy v. Freshwater, 623 F.3d 90 (2d Cir. 2010), a case that is factually similar to this one in certain respects. In Freshwater, the Plaintiff brought an excessive force claim under 42 U.S.C. § 1983 based upon injuries he sustained at the hands of a police officer while Plaintiff was actively resisting a lawful arrest. Beyond those injuries, the Freshwater plaintiff also sought to recover for injuries sustained when the police officer in question sprayed pepper spray into his face after he claims he had been handcuffed and subdued. In reviewing the district court's summary dismissal of the entire action, the Freshwater court distinguished between force applied

by the police officer at the time the plaintiff admitted he was actively resisting a lawful arrest (in which case the court upheld summary judgment), and force applied by the police officer at the time when the plaintiff claims - and some of the evidence suggested - that he was no longer resisting arrest (in which case the court vacated the district court's grant of summary judgment). Id. at 96-100. As to the latter category, the Freshwater court explained: "[W]e conclude that a reasonable juror could find that the use of pepper spray deployed mere inches away from the face of a defendant already in handcuffs and offering no further active resistance constituted an unreasonable use of force. Summary judgment, thus, is inappropriate with respect to this claim." Id. at 98.

The same result follows here for the same reason. Although Plaintiff was not in handcuffs when Tomaine applied the taser a second time, a reasonable jury could conclude that Plaintiff was offering no further resistance, that Tomaine was objectively unreasonable in tasing Plaintiff again. As such, summary judgment is inappropriate to the extent Plaintiff" claims excessive force based upon Tomaine's second application of the taser. 7

Because genuine issues of material fact exist regarding Plaintiff's claim, genuine issues of material fact also preclude a determination of qualified immunity on the present Motion. See Oliveira v. Mayer, 23 F.3d 642, 649 (2d Cir. 1994) (though immunity "ordinarily should be decided by the court, that is true only in those cases where the facts concerning the availability of the defense are undisputed; otherwise, jury consideration is normally required.").

C. Officer Barbagallo

"A law enforcement officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers." O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988) (finding that a police officer "can be found liable [under § 1983] for deliberately choosing not to make a reasonable attempt to stop" a co-officer from violating the plaintiff's constitutional rights through the use of excessive force). Because Plaintiff makes no allegation that Barbagallo employed the taser. Plaintiff's claim against Barbagallo must be construed as a claim for failure to intercede.

According to Defendants, Plaintiff's claim against Barbagallo must be dismissed because, even if Tomaine violated Plaintiff's constitutional rights through a second application of the taser, the timing of events did not allow Barbagallo a realistic opportunity to intercede. See Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994) ("In order for liability to attach, there must have been a realistic opportunity to intervene to prevent the harm from occurring."). Defendants specifically argue that, according to the Taser Use Report, only 10 seconds elapsed between Tomaine's first and second applications of the taser, and that Barbagallo therefore lacked a reasonable opportunity to intercede. For the Court to accept this argument, however, it would need to conclude that Plaintiff's rendition of events (i.e., that 3 to 4 minutes elapsed between taser applications) is untrue and that the information set forth in the Taser Use Report is true. Defendants' argument must fail because, at this stage of the litigation, the Court must resolve all ambiguities and draw all reasonable inferences in the light most favorable to the party opposing the motion. See Quaratino, 71 F.3d at 64; Gallo, 22 F.3d at 1224 (district court's role on a Rule 56 motion is one of "issue finding," and not "issue resolution").

Moreover, even if the Court were to credit the timing of events as set forth in the Taser Use Report, there is a genuine issue of material fact as to whether Defendants were laughing and joking during Tomaine's second application of the taser. If established at trial, a jury could reasonably conclude that such behavior, in this context, supports a finding of liability for failure to intercede.

Because genuine issues of material fact exist regarding Plaintiff's claim against Barbagallo, genuine issues of material fact also preclude a determination of qualified immunity on the present Motion. See Oliveira, 23 F.3d at 649.

D. Heck v. Humphrey

Citing Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), Defendants also argue that they cannot be held liable for applying excessive force in connection with Plaintiff's arrest since any such finding would necessarily imply the invalidity of Plaintiff's criminal conviction. This argument is without merit.

In Heck, the United States Supreme Court held that "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." Id. at 486. Therefore, "a state prisoner's § 1983 action is barred (absent prior invalidation) - no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) - if success in that action would necessarily demonstrate the invalidity of confinement or its duration." Wilkinson v. Dotson, 544 U.S. 74, 81-82, 125 S. Ct. 1242, 161 L. Ed. 2d 253 (2005); see also Fifield v. Barrancotta, 353 Fed. Appx. 479, 480 (2d Cir. 2009).

If successful, Plaintiff's § 1983 claim would not necessarily demonstrate or imply the invalidity of his criminal conviction. Indeed, Plaintiff does not dispute that he was lawfully arrested, and does not question the validity or duration of his sentence. See, e.g., Response Memo., at 5 ("The Plaintiff's claim is clear, that is, that defendant police officers used excessive force in effectuating a lawful arrest.") (emphasis added). Rather, Plaintiff seeks actual damages for personal injuries he sustained during his arrest, which he claims were a result of Defendants' use of excessive force. In other words, Plaintiff does not challenge the basis for his arrest, the legality of his conviction, or the propriety of his sentence. His claim here is predicated solely upon constitutional violations that he claims occurred in connection with a "lawful arrest."

In the Second Circuit, it is "well established than an excessive force claim does not usually bear the requisite relationship under Heck to mandate its dismissal." Smith v. Fields, No. 95 Civ. 8374, 2002 U.S. Dist. Lexis 3529, at *3 (S.D.N.Y. March 4, 2002) (citing cases). Indeed, a claim for "the use of excessive force lacks the requisite relationship to the [disciplinary sentence]" necessary to invocation of the Heck rule. Jackson v. Suffolk County Homicide Bureau, 135 F.3d 254, 257 (2d Cir. 1998); see also Bourdon v. Vacco, 213 F.3d 625 (2d Cir. 2000) (Heck did not bar excessive force claims stemming from police officers' search). The reason for this precedent, of course, is that "police might well use excessive force in effecting a perfectly lawful arrest.

And so a claim of excessive force in making an arrest does not require overturning the plaintiff's conviction even though the conviction was based in part on a determination that the arrest itself was lawful." Sales v. Barizone, 03 Civ. 6691 (RJH), 2004 U.S. Dist. Lexis 24366, *44 & n.24 (S.D.N.Y. Dec. 2, 2004) (quoting Robinson v. Doe, 272 F.3d 921, 922 (7th Cir. 2001)).

Several other Circuits, despite challenges under Heck, have upheld excessive force claims in the context of searches and arrests. Robinson, 272 F.3d at 922; Martinez v. City of Albuquerque, 184 F.3d 1123 (11th Cir. 1999); Nelson v. Jashurek, 109 F.3d 142, 145 (3d Cir. 1997) ("the fact that Jashurek was justified in using 'substantial force' to arrest Nelson does not mean that he was justified in using an excessive amount of force in effectuating that arrest"); Smithart v. Towery, 79 F.3d 951, 952-53 (9th Cir. 1996) (per curiam) (plaintiff's excessive force claim arising out of arrest not barred by Heck); Wells v. Bonner, 45 F.3d 90, 95 (5th Cir. 1995) (remarking that Heck would not bar a civil suit for an unreasonable seizure predicated on the use of excessive force).

The same reasoning applies here. Simply stated, a finding that Defendants used excessive force in placing Plaintiff under arrest - which Plaintiff concedes was lawful - would neither demonstrate nor imply that his conviction and sentence were in any way invalid. As such, Heck does not require or warrant summary dismissal of the Complaint.

IV. CONCLUSION

For the foregoing reasons, I conclude - and respectfully recommend that Your Honor should conclude - that Defendants' motion for summary judgment should be GRANTED as to all Defendants to the extent Plaintiff seeks to recover in connection with Tomaine's first application of the laser, and DENIED as to all Defendants to the extent Plaintiff seeks to recover in connection with Tomaine's second application of the taser.

V. NOTICE

Pursuant to 28 U.S.C. §636(b)(1), as amended, and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days, plus an additional three (3) days, pursuant to Fed. R. Civ. P. 6(d), or a total of seventeen (17) days, see Fed. R. Civ. P. 6(a), from the date hereof, to file written objections to this Report and Recommendation. Such objections, if any, shall be filed with the Clerk of the Court with extra copies delivered to the chambers of The Honorable Cathy Seibel at the United States Courthouse, 300 Quarropas Street, White Plains, New York, 10601, and to the chambers of the undersigned at the same address.

Failure to file timely objections to this Report and Recommendation will preclude later appellate review of any order of judgment that will be entered.

Requests for extensions of time to file objections must be made to Judge Seibel.

Dated: May 10, 2011
White Plains, New York

Respectfully Submitted,

Paul E. Davison
United States Magistrate Judge
Southern District of New York

Notes:

1 Because Defendants answered the Complaint prior to filing the instant Motion, the Court must construe the Motion as one for summary judgment pursuant to Federal Rule 56, and not as one for dismissal under Federal Rule 12(b)(6). See Fed. R. Civ. P. 12(b) (a Rule 12(b) motion "must be made before pleading if a responsive pleading is allowed.").

2 Copies of unreported cases cited herein are being mailed to Plaintiff. See Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009).

3 At his deposition, Plaintiff testified that he was attempting to drop the knife when Tomaine first used the taser. Rule 56.1 Statement, Ex. B (Greenfield Depo. Tr., at 16). However, Plaintiff has also admitted to "brandishing or threatening the police with a knife." See, e.g., Response Memo., at 5 (referring to Plaintiff's plea allocution).

4 In their reply brief, Defendants assert - for the first time - that there was only a ten (10) second lapse between Tomaine's first and second applications of the taser, thereby implying that Plaintiff's recollection of the timing of events is incorrect. Defendants attach to their reply brief an affidavit and a "Taser Use Report" that allegedly support their position. Because Defendants raise this argument for the first time in their reply memorandum, however, it cannot be considered by the Court in resolving the instant Motion. See, e.g., Barclays Capital Inc. v. Theflyonthewall.com, 700 F.Supp. 2d 310, 352 (S.D.N.Y. 2010) ("Arguments raised for the first time in a reply may not be considered when the opposing party is deprived of the opportunity to be heard as to that issue."); Knipe v. Skinner, 999 F.2d 708, 711 (2d Cir. 1993) ("Arguments may not be made for the first time in a reply brief")). This result is not altered by Defendants' argument that Plaintiff "changed his legal theory" (by dropping his claim based upon the first taser application) in response to Defendants' motion. Indeed, Plaintiff has always alleged that the second application of the taser constituted excessive force, see Compl., addendum at 1 ("When the second attack happened I was already on the ground. There was no need for them to shoot me again. They used excessive and deadly force.") (emphasis added), and there is simply no excuse for Defendants' failure to use the Taser Use Report in their Motion. In any event, the Taser Use Report is not conclusive evidence as to the timing of the taser applications, and at most creates a genuine issue of material fact as to the timing of the taser applications. Defendants may, of course, seek to admit this evidence at trial.

5 During oral argument, Defendants' counsel confirmed that the taser was set to dart mode. "[A]pplying a Taser in dart mode (wherein darts are shot at the suspect from some distance) . . . can cause neuro-muscular incapacitation." Brooks v. City of Seattle, 599 F.3d 1018, 1026 (9th Cir. 2010); see also Marquez v. City of Phoenix, CV-08-1132-PHX-NVW, 2010 U.S. Dist. Lexis 88545 (D. Ariz. Aug. 24, 2010) ("In probe mode or dart mode, where the darts are sufficiently separated, the taser works by stimulating skeletal muscles and causes incapacitation.").

6 While "an arresting officer's use of racial epithets does not constitute a basis for a § 1983 claim," Miro v. City of New York, 95 Civ. 4331 (TPG), 2002 U.S. Dist. Lexis 9857, *12 (S.D.N.Y. June 3, 2002), and "[a]n arresting officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force," Graham v. Connor, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), Plaintiff's claim that Defendants were laughing and making jokes during the second round of tasing is relevant to Defendants' perception of the threat posed by Plaintiff and, in turn, the objective reasonableness of their response to that perceived threat.

7 The Court is not persuaded that Plaintiff's claim is precluded, under the doctrine of collateral estoppel, on account of his guilty plea to the charge of menacing a police officer. In taking that plea, Plaintiff admitted that he brandished a knife in the presence of Defendants. Although Defendants are correct to point out that Plaintiff is now collaterally estopped from denying that particular fact, Burgos v. Hopkins, 14 F.3d 787, 792 (2d Cir. 1994), Plaintiff does not attempt to do so. More importantly, for the reasons stated above, the fact that Plaintiff brandished a knife prior to being tased in the first instance is not dispositive on the question of whether Defendants violated Plaintiff's Fourth Amendment rights in connection with Tomaine's second application of the taser. See Sullivan, 225 F.3d at 166 (The fact that Plaintiff initially resisted arrest "does not give [Defendants] license to use force without limit"); see also Freshwater, 623 F.3d 90.