SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS Part 20
HON. PATRIA FRIAS-COLÓN, J.S.C.

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Raymond Martinez, as Administrator of the Estate of Robert Ortiz,

PLAINTIFF,

-against-

The City of New York,

DEFENDANT.

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Index # 526219/2023
Cal. # 23 Mot. Seq. # 1

DECISION/ORDER

Recitation as per CPLR §§ 2219(a) and/or 3212(b) of papers considered on review of this Motion:
NYSCEF Doc #s 16-34; 54 by Defendant
NYSCEF Doc #s 37-53 by Plaintiff

Upon the foregoing cited papers and after oral argument on July 3, 2024, pursuant to CPLR § 3212(b), Defendant The City of New York's ("City") Motion for Summary Judgment and Dismissing the Verified Complaint, dated September 11, 2023, of Plaintiff Raymond Martinez, as Administrator of the Estate of Robert Ortiz, because "the force used [against Ortiz by Police Officer James Hasper ("PO Hasper")] was objectively reasonable,"[1] is GRANTED in part and DENIED in part.

Background

To effectuate Ortiz's arrest for multiple vehicle-related offenses (the "incident") in the early evening of July 10, 2014, PO Hasper shot and injured Ortiz. In connection with the incident, Ortiz commenced an action in the United States District Court for the Eastern District of New York ("District Court")[2] against several Defendants, including PO Hasper and the City. In the District Court complaint, Ortiz asserted (as relevant herein) an excessive force claim under 42 USC § 1983 and a state law battery claim (the "prior action")[3]. After discovery was completed in the prior action, the District Court (in relevant part) granted summary judgment on the basis that Ortiz's excessive force claim under 42 USC § 1983 and his state law battery claim against PO Hasper were barred by the doctrine of qualified immunity, which on appeal, the United States Court of Appeals for the Second Circuit ("Second Circuit") affirmed the District Court ruling[4]. With respect to Ortiz's state law battery claim against the City, however, the Second Circuit "remand[ed] [the case] to the [D]istrict [C]ourt with instructions to dismiss the claim *without prejudice*"[5]. The Second Circuit explained:

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[1] NYSEF Doc No. 16.
[2] Following the filing of the District Court matter, Ortiz passed away from unrelated causes and Ortiz's brother (Raymond Martinez) was named administrator of the estate and continued the action.
[3] The underlying facts were exhaustively set forth in the District Court's Amended Memorandum and Order in *Martinez v Hasper*, 2022 WL 130506, *1-2, 5-6 (EDNY 2022) ("*Martinez I*"), and were summarized on appeal by the Second Circuit in the Summary Order in *Martinez v Hasper*, 2023 WL 4417355, *1 (2d Cir 2023) ("*Martinez II*).
[4] *See Martinez II* affirming in part, vacating in part, and remanding *Martinez I*.
[5] *See Martinez II*, 2023 WL 4417355, *3 (emphasis in the original).

> "That Hasper's conduct was not, for purposes of the New York qualified immunity analysis, objectively unreasonable does not resolve the Fourth Amendment reasonableness inquiry, a question which, given Hasper's entitlement to federal qualified immunity, we do not resolve. These analyses are discrete; *the distinction between reasonableness as a component of a Fourth Amendment violation and reasonableness as a component of an immunity defense* results in a situation where an officer is protected in some circumstances even when he mistakenly concludes that probable cause is present when he reasonably believes that a reasonably prudent police officer would have acted even though a reasonably prudent police officer would not have acted"[6].

Taking advantage of the Second Circuit's favorable ruling on his state law battery claim against the City, Plaintiff thereafter commenced the instant action advancing said claim. After the City answered, Plaintiff filed a note of issue certifying discovery was completed in the instant action given the discovery exchanged in the prior action.

Standard of Review

Summary judgment is a drastic remedy which "should only be employed when there is no doubt as to the absence of triable issues." *Pizzo-Juliano v Southside Hosp.*, 129 A.D.3d 695, 696 (2d Dept 2015) (internal quotation marks omitted). "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist." *Castlepoint Ins. Co. v Command Sec. Corp.*, 144 A.D.3d 731, 733 (2d Dept 2016). "It is well established that summary judgment should only be granted where there are no material and triable issues of fact..., and that the papers should be scrutinized carefully in the light most favorable to the party opposing the motion." *Gitlin v Chirinkin*, 98 A.D.3d 561, 561-562 (2d Dept 2012) (internal quotation marks and citations omitted).

"To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, *i.e.*, wrongful under all of the circumstances, and intent to make the contact without the plaintiff's consent." *Higgins v Hamilton*, 18 A.D.3d 436, 436 (2d Dept 2005), *lv denied* 5 N.Y.3d 708 (2005). "Where there is a lawful arrest, intentional contact with the arrested person does not constitute assault and battery, provided such force is reasonable." *Fischetti v City of New York*, 199 A.D.3d 891, 893 (2d Dept 2021). "Claims 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." *Moore v City of New York*, 68 A.D.3d 946, 947 (2d Dept 2009), *appeal dismissed* 15 N.Y.3d 744 (2010), *lv denied* 15 N.Y.3d 713 (2010). "The reasonableness of the amount of force used...must be judged from the perspective of a reasonable officer on the scene...*at the moment the force is used*." *Rogoz v City of Hartford*, 796 F.3d 236, 246-247 (2d Cir 2015) (internal quotation marks omitted; emphasis added). Stated otherwise,

[6] *See Martinez II*, 2023 WL 4417355, *3 n 3 (emphasis added). It is now settled law in the Second Circuit that "municipalities [such as the City here] could be vicariously liable under New York state law for an employee's wrongful conduct, even when the employee [as was the instance with Hasper in *Martinez II*] was entitled to individual qualified immunity." *Callahan v County of Suffolk*, 96 F.4th 362, 370 (2d Cir 2024); *Triolo v Nassau County*, 24 F.4th 98, 113 (2d Cir 2022).

"…the standard to be applied in determining whether the amount of force used exceeded the amount that was necessary in the particular circumstances is *reasonableness at the moment*." Id. at 247 (internal quotation marks omitted; emphasis added).

As a general matter, "[t]he 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." *Brown v City of New York*, 192 A.D.3d 963, 966 (2d Dept 2021) (internal quotation marks omitted). In a recent case, the United States Court of Appeals for the First Circuit employed the following more granular, methodical review of the particular circumstances which collectively comprise the doctrine of "reasonableness at the moment." Specifically:

> "[1] [w]hether a reasonable officer on the scene could believe that the suspect pose[d] an immediate threat to police officers or civilians,
>
> [2] [w]hether a warning was given before the use of force and whether the suspect complied with this command,
>
> [3] [w]hether the suspect was armed...at the time of the encounter or whether the officers believed the suspect to be armed,
>
> [4] [t]he speed with which officers had to respond to unfolding events, both in terms of the overall confrontation and the decision to employ force,
>
> [5] [w]hether the suspect was advancing on the officers or otherwise escalating the situation,
>
> [6] [t]he suspect's physical proximity to the officers at the time of the use of force, such as whether the individual was within range to seriously injure the officers at the time they fired,
>
> [7] [w]hether multiple officers simultaneously reached the conclusion that a use of force was required, and
>
> [8] [t]he nature of the underlying crime."

Bannon v Godin, 99 F.4th 63, 78 (1st Cir, Apr. 22, 2024) (internal quotation marks and citations omitted; alterations in the original), *petition for cert filed* (US Sup Ct, Sept. 12, 2024).

Discussion

Here, the City failed to satisfy its *prima facie* burden of eliminating all triable issues of fact regarding whether PO Hasper's shooting of Ortiz was objectively "reasonable at the moment." *See Eckardt v City of White Plains*, 87 A.D.3d 1049, 1053 (2d Dept 2011). In support of its motion,

the City submitted the deposition testimony of: (1) Ortiz;[7] (2) PO Hasper;[8] (3) Police Officer Frank J. D'Antuono ("PO D'Antuono")[9] who was carpooling to work with PO Hasper shortly before the incident; (4) Detective Michael Espinoza ("Det. Espinoza") and Police Officer Jason Filoramo ("PO Filoramo") who were chasing Ortiz's SUV in their unmarked police car shortly before the incident[10]; and (5) Police Officers David Ramos ("PO Ramos") and John Gergis ("PO Gergis"), both then on patrol in their RMP, who joined Det. Espinoza and PO Filoramo in chasing Ortiz's SUV shortly before the incident[11]. Putting aside Ortiz's pretrial testimony for the moment, the respective pretrial testimonies of police officers Hasper, D'Antuono, Filoramo, Ramos, Gergis, and Det. Espinoza demonstrated the existence of triable issues of fact regarding whether Ortiz posed a threat of imminent death or serious physical injury to the officers, pedestrians, and/or other drivers to sufficiently justify PO Hasper's shooting of Ortiz[12]. *See Owens v City of New York*, 183 A.D.3d 903, 907 (2d Dept 2020); *see generally Lepore v Town of Greenburgh*, 120 A.D.3d 1202, 1203 (2d Dept 2014) ("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."). In and of itself, Ortiz's pretrial testimony raised a triable issue of fact regarding whether PO Hasper's shooting was objectively reasonable under the circumstances. *See Williams v City of New York*, 129 A.D.3d 1066, 1067 (2d Dept 2015).

Equally important, are the aforementioned factors 2, 3, 7, and 8. Ortiz received no warning of the intended use of deadly physical force before Hasper shot him (factor 2). Ortiz was unarmed (factor 3). The was no evidence of a simultaneous conclusion by the other officers on the scene that use of deadly force was required (factor 7). The underlying crime for which Ortiz was being arrested was a low-level offense (factor 8). Weighed in Plaintiff's favor, these factors further support denial of the City's summary judgment motion.

Plaintiff's reliance on PO Hasper's admitted violation of the Patrol Guide is misplaced[13]. As the Court of Appeals observed:

> "The Patrol Guide is an internal manual – nearly 1,500 closely printed pages – containing thousands of rules, procedures and policies adopted by the Police Commissioner for the governance, discipline, administration and guidance of the Police Department (*see* Foreword to New York City Police Department Patrol Guide). It is not a body of law or regulation establishing clear legal duties that should serve as a basis for civil liability of municipalities."

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[7] NYSCEF Doc No. 21.
[8] NYSCEF Doc No. 24.
[9] NYSCEF Doc No. 25.
[10] NYSCEF Doc Nos. 22 and 23, respectively.
[11] NYSCEF Doc Nos. 26 and 27, respectively.
[12] NYSCEF Doc No. 24 at pg. 92 ¶¶4-7, pg. 59 ¶23-pg. 60 ¶13.
[13] Patrol Guide § 203-12(g) in effect at the time of the incident, provided in relevant part, that "[p]olice officers shall not discharge their firearms at...a moving vehicle unless deadly physical force is being used against the police officer or another person present by means *other than a moving vehicle*" (emphasis added). NYSCEF Doc No. 49 (Patrol Guide § 203-12 "Deadly Physical Force," effective date Aug. 1, 2013). PO Hasper conceded that he violated Patrol Guide § 203-12 (g) (*see* PO Harper's pretrial deposition, NYSCEF Doc No. 24 at page 93, lines 15-21).

Galapo v City of New York, 95 N.Y.2d 568, 574-575 (2000). *See also Johnson v City of New York*, 152 A.D.3d 503, 504 (2d Dept 2017) ("the trial court providently exercised its discretion by not admitting the NYPD Patrol Guide into evidence, as the patrol guide imposed a higher standard of conduct on the defendants than that imposed by law"); *Abeyta v City of New York*, 588 Fed. Appx. 24, 25 (2d Cir 2014) ("The District Court...did not abuse its discretion in precluding evidence of police procedures and patrol guides....The District Court was entitled to find that evidence of the procedures and guides could have 'unduly confuse[d] the jury' because a departure from the guides does not necessarily establish a legal or constitutional violation.")[14].

Lastly, Plaintiff's demand for punitive damages against the City is against the prevailing law. *See Krohn v New York City Police Dept.*, 2 N.Y.3d 329, 338 (2004); *Gala v City of New York*, 83 Misc. 3d 1275(A), 2024 N.Y. Slip Op. 51100(U), *10 (Sup Ct, Kings County 2024). Therefore, Plaintiff's demand for punitive damages is denied.

Conclusion

The City's motion for summary judgment is granted to the extent that Plaintiff's demand for punitive damages is stricken. The City's motion for summary judgment is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: October 30, 2024
Brooklyn, New York

Hon. Patria Frias-Colón, J.S.C.

[14] In light of its determination, the Court did not consider the opinion of Plaintiff's expert Det. John J. Baeza, NYPD (ret.). In his February 28, 2019 report, Det. Baeza confirmed that "[PO] Hasper's firearm discharge was a flagrant and reckless violation of mandatory police rules and procedures that was totally unwarranted." (*see* NYSCEF Doc # 51, page 5).