UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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Report & Recommendation

Jonathan Corbett,

Plaintiff,

11-cv-3549 (CBA) (VMS)

v.

City of New York, Raymond Kelly, Officer Does 1 through 4,

Defendants.

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Scanlon, Vera M., United States Magistrate Judge:

Following the close of discovery, Defendants City of New York ("the City") and Police Commissioner Raymond Kelly ("Commissioner Kelly") (together, the "Defendants") moved for summary judgment against the claims of pro se Plaintiff Jonathan Corbett ("Mr. Corbett") based on an alleged illegal stop-and-frisk to which he was allegedly subjected by four unknown New York City police officers (Officers Doe 1 through 4). Mr. Corbett raised claims under 42 U.S.C. § 1983, 42 U.S.C. § 1981, the Fourth and Fifth Amendments of the U.S. Constitution, the New York State Constitution and New York state common law (false arrest, battery, assault, respondeat superior and negligence). See Docket Entry ("DE") [26]. Mr. Corbett also moves for injunctive relief, for leave to file a second amended complaint, and for leave to introduce new evidence. See DE [52], [51],

[54]. Chief Judge Carol Bagley Amon referred these motions to the undersigned for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons that follow, I respectfully recommend that summary judgment be granted in favor of Defendants, that the motions for injunctive relief and for leave to file a second amended complaint be denied, and that the motion for leave to introduce new evidence be granted.

I. Procedural History And Discovery

A. Discovery

The original complaint was filed on July 20, 2011, DE [1], and the Amended Complaint ("Am. Compl.") was filed February 24, 2012, DE [26].[1] On or about March 9, 2012, Defendants City and

[1] The First Amended Complaint sets forth the following claims:

1. Counts 1-6: Violations of 42 U.S.C. § 1983, as a result of the allegedly illegal stop-and-frisk (Against the New York Police Department ("N.Y.P.D."), Raymond Kelly, four John Doe Officers).
2. Counts 7-12: Violations of 42 U.S.C. § 1981, as it is claimed that the alleged stop-and-frisk was performed based upon Plaintiff's race (Against N.Y.P.D., Raymond Kelly, four John Doe Officers).
3. Counts 13-17: Violation of the Fourth Amendment of the U.S. Constitution, due to the alleged unlawful seizure (Against Raymond Kelly, four John Doe Officers).
4. Counts 18-22: Violation of the Fourth Amendment of the U.S. Constitution, due to the alleged illegal search (Against Raymond Kelly, four John Doe Officers).
5. Counts 23-27: Violation of the Fourth Amendment of the U.S. Constitution, due to the allegedly over-intrusive nature of the stop-and-frisk (Against Raymond Kelly, four John Doe Officers).
6. Counts 28-32: Violation of the Fifth Amendment of the U.S. Constitution, as Plaintiff alleges that he invoked his right

Commissioner Kelly answered Plaintiff's First Amended Complaint, DE [27].

Discovery proceeded, with a particular focus on identifying the four John Doe officers listed in the complaint. On or about January 23, 2012, Mr. Corbett and Defendants' counsel attended an in-person discovery conference before Magistrate Judge Azrack. During the conference, Mr. Corbett inspected a photo array containing fifty-four photographs of all of the plainclothes officers with the 77th precinct who were on duty at the time of the alleged incident, together with fillers. See Defendants' Rule 56.1 Statement ("Def. St.")(DE [47]) ¶ 11; DE [21]; Zgodny Declaration ("Zgodny Decl."), Ex. C, City Defendants' Dec. 8, 2011 Letter Motion at DE [15]. According to Defendants,

> Plaintiff was allowed to spread out the photographs of each of the nine photo arrays on counsel [sic] table and view them all together for as long as he needed in order to identify any potential officers. Magistrate Judge Azrack gave

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to remain silent (Against Raymond Kelly, four John Doe Officers).

7. Counts 33-38: Violation of Article 1, Section 12 of the New York State Constitution, because it prohibits unreasonable search and seizure (Against N.Y.P.D., Raymond Kelly, four John Doe Officers).
8. Counts 39-44: Common Law False Arrest (Against N.Y.P.D., Raymond Kelly, four John Doe Officers).
9. Counts 45-50: Common Law Battery (Against N.Y.P.D., Raymond Kelly, four John Doe Officers).
10. Counts 51-56: Common Law Assault (Against N.Y.P.D., Raymond Kelly, four John Doe Officers).

> plaintiff great leeway in his effort to identify any police officers who may have been involved in the alleged ten minute stop. The only officers he identified were determined to have not been present in the area in which the stop-and-frisk allegedly occurred.

See Zgodny Decl., Ex. D at 3. Defendants noted that Mr. Corbett chose two officers from the photo array and that, based upon their investigation, the two officers could not have been involved in the alleged stop. See id. One of the officers was retired at the time, and the other officer was not on duty at the time of the alleged incident. See Def. St. ¶ 12; DE [25]. In his opposition to the motion for summary judgment, Mr. Corbett confirmed that he "never identified any of them with any certainty." Pl. St. ¶ 12; DE [57].

Discovery continued. Magistrate Judge Azrack ruled that the City of New York would not be compelled to produce to Mr. Corbett a copy of the New York Police Department's "roll call" from the 77th precinct containing the names of all police officers scheduled to be on duty at the time of the alleged incident. Mr. Corbett objected to this decision, which was affirmed by Chief Judge Amon, who wrote, "In light of the fact that the plaintiff does not know the names of the police officers who allegedly detained him, the Court is not convinced that viewing a random list of officer names would help the plaintiff identify who was involved." DE [35] at 2.

On or about May 4, 2012, Mr. Corbett requested that the Defendants further investigate other specialized units in the confines of the 77th Precinct where the alleged incident occurred in order to ascertain the identities of the officers involved in the alleged incident. Def. St. ¶ 55; DE [36]. Mr. Corbett argued to the Magistrate Judge that there may have been other police officers not assigned to the regular 77th precinct roll who may have been the officers who stopped and frisked him. Mr. Corbett and Defendants' counsel came to the following agreement regarding an additional review of records to identify the officers allegedly involved in the incident, which was reported to the Court by a May 18, 2012 letter of the Assistant Corporation Counsel on the case:

> Defendant City will endeavor to ascertain the identities of any plainclothes officers who may have been working in groups of four in unmarked vehicles on the date of the alleged incident and who were assigned to Brooklyn North Narcotics or Anticrime units within the confines of the 77th Precinct. If the City is able to identify any such officers, we will conduct further investigation into whether they were involved in the incident at issue.

DE [37].

By letter dated June 18, 2012, the same Assistant Corporation Counsel informed the Court as follows:

> I have investigated both the Brooklyn North Narcotics and the Anticrime Units as well as the Brooklyn Gang Squad Detective Bureau and have determined that there were no officers traveling

> in groups of four in an unmarked vehicle in the confines of the 77th precinct. In fact, based upon my investigation, upon information and belief, there was not even a group of four officers assigned to any vehicle, whether marked or unmarked, on the date and time of the incident.

DE [38]; see Def. St. ¶ 57. Based upon the City's investigation, Plaintiff voluntarily dismissed the John Doe officers. See DE [39]. In his notice of dismissal, Mr. Corbett wrote:

> The City of New York has alleged that it has taken every reasonable avenue to identify the four police officers who violated the Plaintiff in this action, yet still cannot do so. Despite the offensiveness of the notion that the City may effectively limit its liability (at least as it pertains to causes of action requiring individually named officers) simply by being "unable" to locate its own employees, Plaintiff is left with no avenue to identify and serve these John Doe defendants.
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> Therefore, Plaintiff hereby dismisses Defendants Officer Does 1 through 4, parties that have not yet filed responsive pleadings, under Fed. R. Civ. P. Rule 41(a)(1)(A), without prejudice.

DE [39]. Mr. Corbett thus agreed that he had not identified the police officers that he alleged had unlawfully stopped and frisked him.

B. Summary Judgment Filings

On June 25, 2012, Defendants' summary judgment briefing schedule was approved. On September 24, 2012, Defendants submitted the fully briefed motion for summary judgment. DE

[45]. In support of their motion for summary judgment, Defendants submitted a Local Rule 56.1 Statement, with citations to the record, including Mr. Corbett's deposition ("Pl. Dep."). Mr. Corbett submitted an opposition but failed to submit a Local Rule 56.1 Statement. DE [53]. On November 21, 2012, the undersigned ordered Mr. Corbett to submit such a statement by December 4, 2012, which he did. In Mr. Corbett's Local Rule 56.1 Statement, he "stipulated to the statements of fact submitted by the Defendants in their motion to Dismiss, with the following exceptions." DE [57].

Plaintiff now requests that this Court allow him to introduce additional evidence in opposition to the summary judgment motion in the form of an audio recording of a stop-and-frisk of a man other than Plaintiff, recorded approximately three weeks before Plaintiff was allegedly stopped. See DE [54]. Plaintiff contends that the recording demonstrates that the man in question was stopped without probable cause and that he was verbally abused by New York City police officers. See id. Plaintiff also claims that the recording demonstrates that race was a basis for the stop. See id.

In the interest of having the most complete record possible, I respectfully recommend allowing Plaintiff's submission of supplemental evidence. However, this supplemental evidence does not support Plaintiff's claim that he, personally,

was illegally stopped and frisked by police officers or that the City has an illegal stop-and-frisk policy.

II. Record Evidence On Summary Judgment Motion

In describing the facts, I draw from the amended complaint, Mr. Corbett's deposition, and Defendants' 56.1 Statement, noting Mr. Corbett's disagreement as relevant. See DE [26, 47, 48, 57].

A. The Alleged Incident

At the heart of Defendants' argument and Local Rule 56.1 statement is the absence of facts offered by Mr. Corbett to prove that any N.Y.P.D. officer was involved in the alleged incident. The focus of this presentation is thus on whether there is a disputed issue of material fact as to whether any N.Y.P.D. officer was involved with the incident Mr. Corbett alleges in his Amended Complaint.

In the First Amended Complaint, Mr. Corbett alleges that the City and four John Doe N.Y.P.D. officers violated his civil rights. See generally Am. Compl. He alleges that on or about June 17, 2011, at approximately 12:35 a.m., in the vicinity of the northeast corner of Schenectady Avenue and Sterling Place in Brooklyn, New York, he walked out of a deli after purchasing a bottle of water. See id. ¶ 17. A group of four men occupying an unmarked vehicle parked at the corner stopped Mr. Corbett and identified themselves to him as police officers from the

N.Y.P.D. See id. ¶ 18. Mr. Corbett believed, and still believes, that these men were police officers, based upon Mr. Corbett's knowledge and belief that plainclothes officers with the N.Y.P.D. often drive similar unmarked vehicles and have two or four men occupying such vehicles; the presence of electronic equipment between the occupants of the front seats; and the tone, demeanor, and appearance of the four men. See id. ¶ 19. Mr. Corbett alleged that he was doing nothing out of the ordinary to justify the stop, and that there was nothing about his appearance, clothing, behavior or demeanor to justify the stop – either before it began or as it transpired. See id. ¶ 20.

Mr. Corbett is a light-skinned Caucasian. See id. ¶ 22. He alleges that "[t]he neighborhood in which the incident took place is primarily inhabited by African American residents, and indeed CORBETT noticed no other persons that appeared to be white in his vicinity at the time of the incident" See id. ¶ 23. Mr. Corbett alleges that the officers implied to him "through their questioning and tone of voice that it was unusual for white people to be in that neighborhood, and that this was their reason for questioning Mr. Corbett." See id. ¶ 24. For example, Officer Doe 1 began by asking Mr. Corbett, "What are you doing in this neighborhood?" Id. ¶ 21. Officer Doe 1 continued to ask Mr. Corbett why he was there, including asking

questions about where he was coming from and where he was going. See id. ¶ 26. Mr. Corbett declined to describe his past and future whereabouts. See id. ¶ 27. Officer Doe 1 asked Mr. Corbett to produce identification, which Mr. Corbett declined to do. See id. ¶¶ 28-29. Mr. Corbett asked Officer Doe 1 if he was being detained or if he was free to go, to which the officer responded that Mr. Corbett was being detained. See id. ¶¶ 30-31.

Officers Doe 2 and 3 exited the vehicle. See id. ¶ 32. Officer Doe 2 informed Mr. Corbett that the area was a "high drug trafficking area" and that Mr. Corbett was the subject of an investigation. See id. ¶¶ 32-33. Officer Doe 2 then informed Mr. Corbett that he would be searching him, to which Mr. Corbett replied that he did not consent, but that he would not physically resist the search. See id. ¶¶ 34-35. There was nothing regarding Mr. Corbett's appearance, clothing, behavior or demeanor that would have suggested that he was armed or dangerous. See id. ¶ 41. Mr. Corbett alleges that the officers were armed with handguns, clubs and pepper spray. See id. ¶ 44. Officer Doe 2 frisked Mr. Corbett, moving his hands over his clothing. See id. ¶ 45. He concentrated on the pockets of Mr. Corbett's jeans for approximately one minute, palpating soft objects inside the pockets. See id. ¶ 46. The officers found no hard objects resembling a weapon in Mr. Corbett's pockets,

but they asked him to empty his pockets, which Mr. Corbett declined to do. See id. ¶¶ 47-51. The officers continued their questioning and repeatedly threatened Mr. Corbett with spending the night in jail if he did not answer their questions and produce identification. See id. ¶ 52. Mr. Corbett declined to produce identification or to answer questions, except for his name, date of birth, and place of residence. See id. ¶ 53. After approximately 10 minutes, the officers, without explanation, discontinued their questions and investigation. Id. ¶ 54. They told Mr. Corbett to "have a nice night." Id.

As to damages, Mr. Corbett never gave his identification or any of his personal belongings to any of these men. See Def. St. ¶ 45 (Pl. Dep. at 164:24-165:4). He never attempted to physically walk away and was not prevented by anyone from leaving. See Def. St. ¶ 46 (Pl. Dep. at 164:13-16). Mr. Corbett was never touched by any of these men in any way other than the alleged pat down. See Def. St. ¶ 47 (Pl. Dep. at 164:17-19). Mr. Corbett was never taken to a police precinct after this incident on the street. See Def. St. ¶ 48 (Pl. Dep. at 183:4-6). He was never given a desk appearance ticket or a summons after this incident. See Def. St. ¶ 49 (Pl. Dep. at 183:16-19). No criminal charges were ever brought against Mr. Corbett. See Def. St. ¶ 50 (Pl. Dep. at 184:11-14). Mr. Corbett never had to appear in Court to answer any criminal

charges. See Def. St. ¶ 51 (Pl. Dep. at 183:20-24). He did not suffer any physical injuries. See Def. St. ¶ 52 (Pl. Dep. at 184:15-23). Mr. Corbett did not seek any medical or psychological treatment of any kind related to this incident. See Def. St. ¶ 53 (Pl. Dep. at 184:24-185:6).

The only damages Mr. Corbett is alleging are presumed damages from the violation of his constitutional and state law rights. See Def. St. ¶ 54 (Pl. Dep. at 184:24-185:6).

B. Physical Descriptions Of The Officers

As to what the John Doe individuals looked like, Defendants argue that Mr. Corbett does not recall with any specificity what any of the officers looked like. He does not recall what they were wearing, and he cannot describe general characteristics such as race or hair color. Def. St. ¶ 36 (Pl. Dep. at 113:16-114:15; 117:21-122:7). In Mr. Corbett's Local Rule 56.1 Statement, he stated that "[a] closer reading of Mr. Corbett's deposition will show that he indeed described general characteristics of the officers." Pl. St. ¶ 36. Contrary to Defendants' Local Rule 56.1 statement, in his deposition, Mr. Corbett did give some general physical characteristics of the officers, which Defendants omitted.[2] As

[2] We note that neither Mr. Corbett nor Defendants drew the Court's attention to these sections of Mr. Corbett's deposition. "While the trial court has discretion to conduct an assiduous review of the record in an effort to weigh the propriety of

to the officer driving the car, Mr. Corbett testified that "he had a medium complexion, probably larger than average build, the best I got he never got out of the car," and that he was more likely Hispanic than black, with his skin being "some tone of brown," but that was "just speculation." Pl. Dep. at 113:18-114:1. He could not say whether he had hair, was bald or was wearing a hat. Id. at 114:5-10. As to the officer in the front passenger seat, Mr. Corbett could not describe him. Id. at 117:24-118:3. As to the passenger sitting behind the passenger in the front seat, Mr. Corbett said he was "medium complexion, not extremely tall, average to larger than average build." Id. at 119:21-25; 121:4-11. Of this officer, he said that he never got within eight feet of him. Id. at 120:13-17. Of the officer seated behind the driver, Mr. Corbett said he had a lighter complexion, but he could not give any other details about this officer. Id. at 121:17-122:7. Of the officers generally, Mr.

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granting a summary judgment motion, it is not required to consider what the parties fail to point out." Monahan v. NYC Dep't of Corrections, 214 F.3d 275, 292 (2d Cir. 2000) (quotations & citations omitted); Amnesty Am. v. Town of West Hartford, 288 F.3d 467, 470 (2d Cir. 2002) (holding that Rule 56 "does not impose an obligation on a District Court to perform an independent review of the record to find proof of a factual dispute"). Nonetheless, as discussed in greater detail below, despite reviewing Mr. Corbett's deposition thoroughly, the facts reported therein (as compared to his conclusions and beliefs) would be insufficient to support a conclusion by a reasonable jury that police officers were involved in the alleged stop.

Corbett said that three of them had a "medium complexion" and one was "a little bit lighter." Id. at 118:12-14. Mr. Corbett could only describe the officers' clothes as "baggy." Id. at 128:17-23. These minimal details are insufficient to identify any particular officer, although they could be useful in excluding some officers, such as female officers, from possible defendants.

C. Police Equipment Or Identification

As or more importantly, as to whether these alleged individuals were police officers, the record shows that none of the four men in the vehicle, alleged by Mr. Corbett to be police officers, was wearing a police uniform. See Def. St. ¶ 20 (Pl. Dep. at 58:8-14; 125:1-6). Mr. Corbett did not observe that 1) any of the four men was wearing a police badge, see Def. St. ¶ 21 (Pl. Dep. at 125:19-22; 138:12-13; 140:13-15); 2) was wearing anything that had any N.Y.P.D. or police insignia, see Def. St. ¶ 22 (Pl. Dep. at 143:6-8); or 3) was carrying a gun, see Def. St. ¶ 23 (Pl. Dep. at 128:1-2, 13-16), baton, see Def. St. ¶ 24 (Pl. Dep. at 129:25-130:1), police radio, see Def. St. ¶ 25 (Pl. Dep. at 130:2-4), or pepper spray, see Def. St. ¶ 26 (Pl. Dep. at 150:2-4). The vehicle that the men were driving was an unmarked sedan. See Def. St. ¶ 27 (Pl. Dep. at 109:2-5; 111:11-13). Nothing inside the vehicle had any precinct or New York City Police Department insignia. See Def. St. ¶ 28 (Pl. Dep. at

125:16-18; 143:3-5).[3] There were no lights or sirens inside the vehicle, and no police lights or sirens were ever turned on. See Def. St. ¶ 29 (Pl. Dep. at 124:13-16; 166:12-14).

Mr. Corbett believed these men to be police officers in part because they were in a group of four traveling in an unmarked sedan and driving at a slow speed. See Def. St. ¶ 30 (Pl. Dep. at 108:23-110:1-12). He believed that there was a computer or some type of computer screen and what appeared to be a radio inside the vehicle. See Def. St. ¶ 31 (Pl. Dep. at 123:6-124:22). He testified that this appeared to him to be police equipment. See Pl. Dep. at 123:18-19. During his deposition, Mr. Corbett stated that "plainclothes officers usually stand out," but he was only able to testify to one previous interaction with plainclothes or undercover officers. See Pl. Dep. at 110:25-111:7.

Mr. Corbett interacted with the men for approximately ten minutes. See Def. St. ¶ 32 (Pl. Dep at 165:13-14). Mr. Corbett never asked any of the men for their names or precinct. See Def. St. ¶ 33 (Pl. Dep. at 140:16-18; 142:21-23). Mr. Corbett had a camera with him during this alleged incident but never took any photographs of the men or the vehicle. See Def. St. ¶ 34 (Pl. Dep. at 188:9-22). He never

[3] Mr. Corbett notes that he was not inside the vehicle and did not inspect it for insignia. See Pl. St. ¶ 28.

took down a license plate number for the alleged unmarked vehicle. See Def. St. ¶ 35 (Pl. Dep. at 111:17-19).

Moreover, we note that Mr. Corbett made no effort to memorialize or investigate the incident other than bringing this lawsuit. Mr. Corbett testified that there were "dozens" of bystanders, but he spoke to none of them after the alleged incident. See Pl. Dep. at 155:4. Mr. Corbett made no public record of the alleged incident other than initiating this action. He did not call 911 after the incident. See Pl. Dep. at 155:12. He made no complaint to the Civilian Complaint Review Board following this alleged illegal stop-and-frisk. See Pl. Dep. at 155:14. Thus, the avenues for any additional investigation were minimal or nonexistent, and discovery in this case was as extensive as it could reasonably be in light of the available leads.

III. Standard For Summary Judgment

Under Federal Rule of Civil Procedure 56, summary judgment is warranted when, viewing the evidence in the light most favorable to the nonmovant, the Court determines that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56; Ricci v. DeStefano, 557 U.S. 557, 586-87 (2009); Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 457 (1992); Taylor v. Ridley, 10-cv-5655 (SJF)(WDW), 2012 WL 5289594, at *2 (E.D.N.Y.

Oct. 19, 2012) (granting summary judgment to police officer defendants where nonmovant plaintiff failed to raise genuine issue of fact in civil rights action). Where the nonmoving party "will bear the burden of proof at trial on a dispositive issue," the nonmoving party bears the burden of production under Rule 56 to "designate specific facts showing that there is a genuine issue for trial." See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (internal quotation marks omitted). A motion for summary judgment requires the party with the burden of proof at trial to come forward with proper evidence and "make a showing sufficient to establish the existence of [each] element of the nonmoving party's case since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 322-23.

In Anderson v. Liberty Lobby, 477 U.S. 242 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Supreme Court articulated the quantum of proof necessary when, as in the case at hand, the movant for summary judgment is the defendant. When a defendant movant requests summary judgment, a nonmovant plaintiff must set forth specific facts demonstrating a genuine issue. Liberty Lobby held that a nonmovant's Rule 56(e) evidence opposing summary judgment must be more than merely possible or colorable. The evidence must be sufficient to

withstand a motion for directed verdict and support the verdict of a reasonable jury. See 477 U.S. at 248. Furthermore, under Liberty Lobby and its progeny, in typical cases in which the nonmovant is the claimant and the claim is subject to the usual "preponderance of the evidence" standard, the nonmovant must respond to a properly made summary judgment motion by setting forth evidence that would allow a reasonable jury to find in its favor using the preponderance standard. Defendants' burden, under Liberty Lobby, is not to "prove" nonliability or to negate a crucial element of the claim, but to demonstrate the absence of substantial evidence concerning a single essential element of Plaintiff's claim. Id. at 249. Thus, if the summary judgment movant does not bear the burden of persuasion at trial, the movant's burden to show presumptive entitlement to summary judgment is satisfied if the movant points to the absence of any factual support for an essential element of plaintiff's claim. If the movant makes this showing (as initially required by Rule 56(c)), an opposing party that bears the burden of persuasion must respond (under Rule 56(e)(2)) by setting out specific facts showing a genuine issue that requires trial.

"Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (internal quotation

marks omitted); see Fabrikant v. French, 691 F.3d 193, 205 (2d Cir. 2012) On a motion for summary judgment, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." Ricci, 557 U.S. at 586 (quoting Scott v. Harris, 550 U.S. 372, 380 (2007)) (where nonmovant employer could not show a genuine issue of material fact as to existence of its defense, summary judgment had to be granted for employee movants). As the Second Circuit Court of Appeals has stated:

> [The] moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case. When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper.

Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1223-24 (2d Cir. 1994) (citations omitted); see Jeffreys v. City of N.Y., 426 F.3d 549, 554 (2d Cir. 2005). The nonmoving party must produce evidence in the record and "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible." Ying Jing Gan v. City of N.Y., 996 F.2d 522, 532 (2d Cir. 1993) (overruling denial of summary judgment to defendant on a Section 1983 claim against him when the record lacked specific facts); Scotto v. Almenas, 143 F.3d 105, 114-15 (2d Cir. 1998) (denying summary judgment to plaintiff where plaintiff's allegations of

conspiracy on the part of defendants was contradicted by affidavits by individuals with first-hand knowledge and was generally unsupported).

"The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Hayut v. State Univ. of N.Y., 352 F.3d 733, 743 (2d Cir. 2003) (alterations in original); see Lyons v. Lancer Ins. Co., 681 F.3d 50, 56–57 (2d Cir. 2012). The nonmoving party cannot avoid summary judgment simply by asserting "some 'metaphysical doubt as to the material facts[,]'" DeFabio v. East Hampton Union Free Sch. Dist., 623 F.3d 71, 81 (2d Cir. 2010) (quoting Jeffreys, 426 F.3d at 554); "may not rely on conclusory allegations or unsubstantiated speculation," Jeffreys, 426 F.3d at 554 (quotations & citations omitted); see DeFabio, 623 F.3d at 81; and must offer "some hard evidence showing that its version of the events is not wholly fanciful," Miner v. Clinton County, N.Y., 541 F.3d 464, 471 (2d Cir. 2008); see McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007); Caban v. City of N.Y., 11-CV-3417 (SAS), 2012 U.S. Dist. LEXIS 170981, at *7 (S.D.N.Y. Nov. 30, 2012) (quoting Cifarelli v. Village of Babylon, 93 F.3d 47, 51 (2d Cir. 1996)). "Mere conclusory allegations, speculation or conjecture will not

avail a party resisting summary judgment." Cifarelli, 93 F.3d at 51.

Although usually "[a]ssessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment," Jeffreys, 426 F.3d at 553–54 (quotations & citations omitted); see McClellan v. Smith, 439 F.3d 137, 144 (2d Cir. 2006), there is a "narrow exception" to that rule. See Fincher v. Depository Trust & Clearing Corp., 604 F.3d 712, 725–26 (2d Cir. 2010) (recognizing an exception to the rule that "a district court may not discredit a witness's * * * testimony on a motion for summary judgment"); Blake v. Race, 487 F. Supp. 2d 187, 202 (E.D.N.Y. 2007); Suarez v. American Stevedoring, Inc., No. 06–CV–6721 (KAM) (RER), 2009 WL 3762686, at *17 (E.D.N.Y., Nov. 10, 2009) "In the rare circumstance where the plaintiff relies almost exclusively on his own testimony, much of which is contradictory and incomplete," the court need not leave the resolution of the matter to the jury. Jeffreys, 426 F.3d at 554. The Second Circuit has stated:

> [I]n certain extraordinary cases, where the facts alleged are so contradictory that doubt is cast upon their plausibility, the court may pierce the veil of the plaintiff's factual allegations and dismiss the claim . . . in certain cases a party's inconsistent and contradictory statements transcend credibility concerns and go to the heart of whether the party has raised genuine issues of material fact to be decided by a jury.

Rojas v. Roman Catholic Diocese of Rochester, 660 F.3d 98 (2d Cir. 2011).

IV. Analysis Of Plaintiff's Claims On Summary Judgment

A. 42 U.S.C. § 1983 Claims

The involvement of a state actor is essential to Mr. Corbett's Section 1983 claims, so his failure to offer factual (as compared to conclusory) evidence of the participation of a state actor in the alleged stop-and-frisk is fatal to his claims. As will be discussed in this section, Mr. Corbett fails to set forth sufficient specific facts upon which a jury could reasonably determine that the alleged incident involved New York City police officers.

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

To prevail on a Section 1983 claim, a plaintiff must show that a defendant acted under color of state law and that a defendant deprived plaintiff of a right secured by the Constitution. See Gomez v. Toledo, 446 U.S. 635, 640 (1980); Ahlers v. Rabinowitz, 684 F.3d 53, 60 (2d Cir. 2012); Palmieri v. Lynch, 392 F.3d 73,

77 (2d Cir. 2004); Pitchell v. Callan, 13 F.3d 545, 547 (2d Cir. 1994). "Color of state law" "encompasses state and local officials and private parties and entities whose conduct constitutes state action within the meaning of the Fourteenth Amendment." Martin A. Schwartz, Section 1983 Litigation Claims & Defenses, Vol. 1, 5-22 (4th ed. 2012). "The official conduct of state and local officials is almost always found to have occurred under color of state law." Id. at 5-23.

In order to survive Defendants' motion for summary judgment as to his Section 1983 claims, Mr. Corbett needs to demonstrate that there is more than a scintilla of evidence that the event in question involved New York City police officers. See Jeffreys, 426 F.3d at 554. As described above, there is almost no information offered by Mr. Corbett as a physical description of the alleged officers themselves. Mr. Corbett cannot identify any of the alleged police officers with particularity, see Pl. Dep. at 113:18-122:7, even when presented with a photo array of all the 77th precinct officers working that evening (along with fillers), see Zgodny Decl., Ex. D.

Defendants conducted an investigation and were unable to locate any group of four police officers operating in any unmarked or marked police vehicle on the night of the alleged incident in Mr. Corbett's vicinity. See Zgodny Decl., Exs. C-F. Mr. Corbett did not observe that the individuals who stopped him

were carrying guns, pepper spray or batons. See Pl. Dep. at 128:2; 130:1; 150:2-4, and his deposition includes no testimony about clubs.[4] He testified that he did not observe the individuals with badges or personal radios. See Pl. Dep. at 125:18; 130:2. He also did not observe shields, insignia or anything identifying a police precinct number. See Pl. Dep. at 125:18; 162:24. The only characteristic by which Mr. Corbett identifies the vehicle as a police vehicle is a computer screen that Mr. Corbett allegedly observed between the driver's and passenger's seats. See Pl. Dep. at 123:9.

Mr. Corbett has thus not come forth with sufficient evidence to demonstrate that there is a genuine issue of material fact, warranting trial by jury, as to the involvement of police officers in this incident. There would be no way for a reasonable jury to find that this information was sufficient to prove by a preponderance of the evidence that the men who allegedly stopped Mr. Corbett were N.Y.P.D. officers. Applying the standard for summary judgment, viewing the evidence in the light most favorable to Mr. Corbett, he cannot show that he was denied a constitutional right by police officers.

[4] This testimonial record contradicts the Amended Complaint. The Amended Complaint states that "[t]he OFFICERS were all armed with handguns, clubs, and pepper spray." ¶ 44. It is worth noting that Mr. Corbett himself drafted the Amended Complaint and made these representations personally, not through an attorney.

The record in the present case is not dissimilar to that before the court in Jeffreys v. City of N.Y., 426 F.3d 549 (2d Cir. 2005). In Jeffreys, a burglary arrestee sued police officers under 42 U.S.C. § 1983, alleging excessive force by claiming that he had been pushed out of a third-story window by unknown officers. The officers moved for summary judgment. In opposition, the plaintiff relied almost exclusively upon his own testimony. Id. at 552. The Jeffreys Court noted that "Jeffreys cannot identify any of the individuals who he alleges participated in the attack, nor can he provide any description of their ethnicities, physical features, facial hair, weight, or clothing on the night in question," id. at 552, and that Jeffreys could not recall how many police officers were present at any given time, id. The Court of Appeals affirmed the grant of summary judgment for the defendants, and stated: "[T]he judge must ask . . . not whether . . . the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." Id. at 553 (citing Liberty Lobby, 477 U.S. at 252).

The Jeffreys Court favorably cited Aziz Zarif Shabazz v. Pico, 994 F. Supp. 460 (S.D.N.Y. 1998), a Section 1983 case involving allegations of excessive force against correctional officers. In Pico, the plaintiff claimed that police officer defendants beat him when he was transferred between prisons.

See id. at 464-66. The plaintiff alleged a conspiracy on the part of police officers to deprive him of his constitutional rights, but "failed to allege facts sufficient to show the existence of any conspiracy." Id. at 467. The plaintiff's testimony was inconsistent, and he "changed his allegations regarding his injuries during the course of [the] litigation." Id. at 469. Then-District Court Judge Sotomayor granted summary judgment to the moving defendants based upon the sparse and inconsistent testimony of the plaintiff, stating:

> Furthermore, in the context of summary judgment, it is my duty to assess the facts presented in a light most favorable to the non-moving party, but not to weigh the credibility of the parties. However, when the facts alleged are so contradictory that doubt is cast upon their plausibility, I am authorized to "pierce the veil of the complaint's factual allegations," dispose of "[s]ome improbable allegations," and dismiss the claim.

Id. at 470 (citing Denton v. Hernandez, 504 U.S. 25, 32, 33 (1992)).

The lack of evidence offered by Mr. Corbett stands in stark contrast to details offered in other cases challenging N.Y.P.D. stop-and-frisk procedures. For example, in Floyd v. City of New York, 813 F. Supp. 2d 417 (S.D.N.Y. 2011), the district court denied summary judgment to the defendants with regard to the sufficiency of a plaintiff's allegations that individuals who had stopped and frisked him were New York City police officers. See id. at 444. In Floyd, plaintiffs, who are members of racial

minority groups, complained of unconstitutional race-based stop-and-frisks. The district court found that there was a triable issue of fact as to the involvement of police officers as to one plaintiff because "two officers who were assigned to the van indicated in their memo books that they were near the location of the stop around the time of the stop." Id. at 445. The plaintiff also identified other officers "whose whereabouts at the time of the stops is somewhat ambiguous in this record." Id. Therefore, the court concluded that there was a triable issue of material fact to be determined. See id.

As discussed above, Mr. Corbett's proffered evidence is of the inadequate kind offered in cases such as Jeffreys and Shabazz, and not of the adequate kind offered in Floyd, in that Mr. Corbett does not identify the individuals who allegedly stopped and frisked him or even offer sufficient evidence to raise a material question of fact that they were police officers.

I respectfully recommend that Defendants be granted summary judgment on the Section 1983 claims.

B. Fourth Amendment Claim

The Fourth Amendment to the United States Constitution states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S.

Const., amend. IV. The Fourth Amendment applies only to governmental action. See Burdeau v. McDowell, 256 U.S. 465, 475 (1921); U.S. v. Int'l Brotherhood of Teamsters, 941 F.2d 1292, 1295 (2d Cir. 1991). As discussed in Section IV.A, Plaintiff has not raised a genuine issue of material fact as to the involvement of state actors in the alleged incident.

The Court notes that, if Plaintiff were able to raise an issue of material fact that there was state involvement, he would be able to make out a triable Fourth Amendment claim that he was illegally stopped and seized under Terry v. Ohio, 88 S. Ct. 1868 (1968).[5] In Terry, the Supreme Court held that the Fourth Amendment "governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime – 'arrests' in traditional terminology." Id. at 1877. The Court further held that "it must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Id.

Under Terry, "in justifying [a] particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 1880. Recent decisions in this district have underlined that a police

[5] Because Defendants' motion here rests on the lack of a state actor's involvement, they do not address the legality of the stop itself.

officer's order to stop constitutes a seizure if a reasonable person would have believed that he was not free to leave and the person complies with the officer's order to stop. See, e.g., Davis v. City of N.Y., No. 10-CV-0699 (SAS), 2012 WL 4813837, at *14 (S.D.N.Y. Oct. 9, 2012) (citing U.S. v. Mendenhall, 446 U.S. 544, 554 (1980), and U.S. v. Simmons, 560 F.3d 98, 105 (2d Cir. 2009)). For example, in Matthews v. City of New York, No. 10-cv-4991 (KAM), 2012 WL 3839505 (E.D.N.Y. Sept. 5, 2012), plaintiffs, while driving an assault victim to a hospital following a beating at a night club, were stopped in their car by police officers. See id. at *2. The Matthews Court stated the constitutional standard for police stops of short duration: "Consistent with the Fourth Amendment, 'the police can stop and briefly detain a person for investigative purposes.'" Id. at *5 (quoting U.S. v. Sokolow, 490 U.S. 1, 7 (1989)). The Matthews Court stated that "[s]uch a detention is known as a Terry stop and requires that 'the officer [have] a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." Id. at *5 (quoting Sokolow, 490 U.S. at 7). The Matthews Court reasoned that the police officers did not have reasonable suspicion that plaintiffs were engaging in criminal activity because the officers did not "see plaintiffs perform any activity, gesture, or threat that might indicate they possessed guns, or would or

did engage in criminal activity. Id. at *5. The court denied defendants' motion for judgment on the pleadings as to plaintiffs' claim for an unreasonable stop under Terry.

Here, had Plaintiff raised a genuine issue of material fact as to the involvement of police officers in the alleged incident, I would have recommended holding that Plaintiff raised a genuine issue of material fact about the legality of the alleged stop and that summary judgment be denied as to this claim. Under the Terry standard, on the facts set forth in section IV.A, supra, the alleged police officers did not have reasonable suspicion upon which to stop Plaintiff.

C. Fifth Amendment Claim

Plaintiff claims that his Fifth Amendment right to remain silent was violated. See Am. Compl. ¶ 114. The Fifth Amendment protects against self-incrimination. It states: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amend. V. The Supreme Court has held that in order to bring a successful Section 1983 claim based on the privilege against self-incrimination in criminal trials, a plaintiff must establish a violation of the underlying privilege. See Chavez v. Martinez, 538 U.S. 760, 767 (2003) (plurality opinion) (holding that a Section 1983 plaintiff was "never made to be a 'witness' against himself in violation of the Fifth Amendment's Self-Incrimination Clause because his

statements were never admitted as testimony against him in a criminal case"); Weaver v. Brenner, 40 F.3d 527, 535 (2d Cir. 1994) ("The Fifth Amendment by its own terms grants a person the right to be silent so as not to be a witness against himself in a criminal case.").

Here, Plaintiff does not allege that he was compelled to act as a witness against himself or that any statements made to the alleged police officers were used against him in a criminal proceeding. By his own account, Plaintiff states that he was released by the police officers and that no charges were ever filed against him. Plaintiff was never taken to a police precinct, nor was he ever given a desk appearance ticket or summons. See Pl. Dep. at 183:4-6, 16-19. As a consequence, Plaintiff's Fifth Amendment claim under Section 1983 fails because he was never compelled to testify as a witness against himself. The Fifth Amendment is inapplicable to the case at hand.

Therefore, even if Plaintiff had offered sufficient evidence of state action, I would have recommended that Defendants be granted summary judgment on this claim.

D. Supervisory Liability Claim

A government official may be personally involved in a constitutional tort if he (1) participated directly in the alleged violation; (2) failed to remedy the violation after

being informed of the violation through a report or appeal; (3) created a policy or custom, or allowed the continuance of such a policy or custom, under which an unconstitutional practice occurred; (4) was grossly negligent in supervising a subordinate who committed the unlawful act; or (5) exhibited deliberate indifference to an individual's constitutional rights by failing to act on information indicating the unconstitutional act was occurring. See Turkmen v. Ashcroft, No. 2-cv-2307 (JG) (SMG), 2013 WL 153158, at *21 (E.D.N.Y. Jan. 15, 2013) (citing Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995)).[6]

Plaintiff appears to allege violations under three Colon factors: (2) failure to remedy a violation after being informed of such violation, see Am. Compl. ¶¶ 83, 100, 110, 117; (3)

[6] It is unclear whether all of the Colon factors survive Ashcroft v. Iqbal, 556 U.S. 662 (2009). The courts in this circuit are divided on the extent to which Iqbal abrogates Colon. In Bellamy v. Mount Vernon Hosp., for example, the court concluded that "[o]nly the first and part of the third Colon categories pass Iqbal's muster." No. 07 Civ. 1801 (SAS), 2009 U.S. Dist. LEXIS 54141, at *27 (S.D.N.Y. June 26, 2009), aff'd, 2010 U.S. App. LEXIS 14981 (2d Cir. July 21, 2010). On the other hand, in D'Olimpio v. Crisafi, the court expressed disagreement with such an approach, and held that "the five Colon categories for personal liability of supervisors may still apply as long as they are consistent with the requirement applicable the particular constitutional provision alleged to have been violated." Nos. 09 Civ. 7283 (JSR), 09 Civ. 9952 (JSR), 2010 U.S. Dist. LEXIS 59563, at *16-*17 (S.D.N.Y. June 15, 2010). Here, the Court need not comment upon which Colon factors it considers to have survived Iqbal because there is no genuine issue of material fact as to the underlying violation upon which Plaintiff's claim of supervisory liability is based.

creation of a policy or custom that caused a violation of Plaintiff's constitutional rights, see id. ¶ 86; and (4) gross negligence in supervising a subordinate who committed the unlawful act, see id. ¶¶ 83, 100, 110, 117.

The fact that Mr. Corbett has not raised a genuine issue of material fact that the allegedly unlawful stop-and-frisk was committed by New York City police officers is fatal to his claim of supervisory liability against Police Commissioner Kelly (and to his claim of municipal liability against the City, as will be discussed in Section IV.E). "One common element of any recognized constitutional tort is that the defendant caused the plaintiff's injury." Turkmen, 2013 WL 153158, at *21.

> Supervisory liability is incurred when a supervisory defendant (a "secondary actor") is in some way "personally involved" with a primary actor's constitutional tort and is a cause of the plaintiff's injury. In the Second Circuit, personal involvement is understood broadly.

Id. at *20. While it is possible to attribute supervisory liability to a defendant for the actions of the employees of that defendant, such a claim will fail on summary judgment when there is no genuine issue of material fact that any violation was committed by the alleged employees (here, the police officers). Therefore, in the absence of an underlying injury committed by a state actor, there can be no claim for liability,

supervisory or otherwise. I respectfully recommend summary judgment be granted to Defendants on this claim.

E. Municipal Liability Claim

Plaintiffs who seek to impose liability on local governments under Section 1983 must prove that an "action pursuant to official municipal policy" caused their injury. Connick v. Thompson, 131 S. Ct. 1350, 1353 (2011) (quoting Monell, 436 U.S. 658, 691 (1978)); see Caban, 2012 U.S. Dist. Lexis 170981, at *15 (holding that, in order for a person "deprived of a constitutional right to have recourse against a municipality under Section 1983, he or she must show harm that results from an identified municipal 'policy,' 'custom,' or 'practice.'"). To impose Section 1983 liability on a local government, a plaintiff must "prove that [his or her] injury was caused by 'action pursuant to an official municipal policy,' which includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." Connick, 131 S. Ct. at 1354 (quoting Monell, 436 U.S. at 691). In Monell, the Supreme Court held:

> [I]t is 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 that the government as an entity is responsible under Section 1983.

Id. at 693. Under Section 1983, however, a municipality may not be held liable solely on the basis of respondeat superior. See Monell, 436 U.S. at 694-95.

If a plaintiff does not demonstrate an underlying constitutional violation, there are no grounds for such a claim under Section 1983 against a municipality. See Segal v. City of N.Y., 459 F.3d 207, 219-20 (2d Cir. 2006) (holding that district court need not reach municipal liability claim where due process claims against individuals failed). Here, as discussed above, Plaintiff has failed to identify adequately disputed issues of material fact that the alleged incident involved police officers or any other state actor. Without the involvement of a state actor, there can be no constitutional violation under Section 1983.

Even assuming, arguendo, that the alleged incident did occur, and did involve police officers, Plaintiff fails to prove that a municipal policy is responsible for the alleged violation. It may well be that the N.Y.P.D. has an unlawful stop-and-frisk policy. For example, as to racial minorities, the existence of such a policy is the subject of active litigation. See, e.g., Ligon v. City of N.Y., 12-CV-2274 (SAS), 2013 WL 71800 (S.D.N.Y. Jan. 8, 2013); Floyd v. City of N.Y., 813 F. Supp. 2d 417 (S.D.N.Y. 2011). In contrast, there is nothing in the record of this case that would, if believed,

suffice to establish that the City of New York has a written or other formal policy, or informal practice, that requires or permits the stopping, questioning and/or frisking of persons without sufficient reasonable suspicion or that any such policy or practice, if it exists, is directed toward Caucasian men such as Plaintiff. Plaintiff's evidentiary record as to the alleged N.Y.P.D. policy and practice does not include admissible evidence to support this claim, as it is primarily conclusory statements and reports about alleged N.Y.P.D. stop-and-frisk practices generally which do not raise an issue of material fact as to his claim.

Furthermore, assuming the alleged incident did occur, in most situations, the occurrence of one minor incident involving a constitutional violation cannot be used to establish the existence of an unconstitutional municipal policy.

> [T]o infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict respondeat superior liability rejected in Monell.

Oklahoma City v. Tuttle, 471 U.S. 808, 831 (1985) (Brennan, J., concurring in part & concurring in the judgment); see Caban, 2012 U.S. Dist. Lexis 170981, at *15 (holding that a policy "cannot arise from a single instance of unconstitutional conduct by an employee of the municipality"). In the absence of proof

of the occurrence of the alleged unconstitutional incident, of the existence of a municipal policy or practice that caused Plaintiff's alleged injuries, or evidence of other similar events, Plaintiff cannot prevail on a claim of municipal liability against New York City or Commissioner Kelly.

V. 42 U.S.C. § 1981 Claim

42 U.S.C. § 1981 (a) states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The Court first notes that "[t]he heart of § 1981 prohibits intentional racial discrimination in the making and enforcing of contracts." Martin A. Schwartz, Section 1983 Litigation Claims & Defenses, Vol. 1, 1-6 (4th ed. 2012); see Memphis v. Greene, 451 U.S. 100, 124 (1981) ("42 U.S.C. § 1981 . . . protects the right of all citizens to enter into and enforce contracts."); see, e.g., Broich v. Inc. Vill. of Southampton, 462 Fed Appx. 39, 40 (2d Cir. 2012) ("Section 1981 outlaws discrimination with respect to the enjoyment of benefits, privileges, terms and conditions of a contractual relationship, such as employment."). In Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 474 (2006),

the Supreme Court stated, "Among the many statutes that combat racial discrimination, Section 1981 . . . has a specific function: it protects the equal right of 'all persons'. . . to 'make and enforce contracts.'"

Although the majority of Section 1981 claims involve contractual or employment disputes, recent cases in this circuit have discussed its equal benefit provision. "There is little case law interpreting the equal benefit provision of Section 1981, and the Second Circuit has declined to give bright-line guidance as to what activity falls within the equal benefit language." Bishop v. Toys "R" Us-NY, LLC, 04-cv-9403 (PKC), 2009 U.S. Dist. LEXIS 50990, at *15 (S.D.N.Y. July 13, 2007). In Bishop, it was stated that "a Section 1981 violation might occur when a defendant injures 'the security of persons and property' in violation of a state law, and does so with a racially discriminatory purpose." Id. (quoting Pierre v. J.C. Penney Co., 340 F. Supp. 2d 308, 313 (E.D.N.Y. 2004)).

To establish an equal benefits claim under Section 1981, which is the kind of claim Plaintiff appears to raise, a plaintiff must allege facts in support of the following elements: (1) plaintiff is a member of a racial minority;[7] (2) an

[7] Plaintiff alleges that 42 U.S.C. § 1981 "explicitly states that non-whites must not be treated differently than a white person," but claims that "the equal protection clause of the Fourteenth

intent to discriminate on the basis of race by defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute. See Drayton v. Toys 'R' Us, Inc., 645 F. Supp. 2d 149, 158 (S.D.N.Y. 2009) (listing elements required to set forth a claim under Section 1981); Browne-Allyne v. White, No. 96-cv-2507, 1999 U.S. Dist. LEXIS 18511, at *10 (E.D.N.Y. Oct. 11, 1999) (citing Mian v. Donaldson, Lufkin & Jenrette Securities Corp., 7 F.3d 1085, 1087 (2d Cir. 1993)). Furthermore,

> Section 1981 "require[s] a plaintiff to plead discriminatory intent with some specificity. Carson v. Lewis, 35 F. Supp. 2d 250, 269-70 (E.D.N.Y. 1999). 'Naked' assertions of racial motivation will not suffice. See Yusuf v. Vassar College, 35 F.3d 709, 713 (2d Cir. 1994). The complaint 'must specifically allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of racially discriminatory intent.'"

Browne-Allyne, 1999 U.S. Dist. LEXIS 18511, at *11. As the Bishop Court stated:

> There must be some evidence of "purposeful and systematic discrimination" in the form of specific instances when members of a recognized group were "singled out for unlawful oppression in contrast to others similarly situated."

Bishop, 2009 U.S. Dist. LEXIS 50990, at *17 (quoting Albert v. Carovano, 851 F.2d 561, 573 (2d Cir. 1988)).

Amendment to the U.S. Constitution demands that the reverse must also be true." See Am. Compl. ¶ 79, FN 5.

Here, Plaintiff is a Caucasian male. See Am. Compl. ¶ 22. He does not allege that he is a member of a minority group. Therefore, he does not satisfy the first element required to establish a claim under Section 1981. He also fails to set forth sufficient allegations of discriminatory intent as he has not alleged intent through any purposeful or systematic discrimination against white males who were similarly situated to himself. Instead, he offers inadmissible material concerning policies that are targeted toward racial minorities. Even in the context of discrimination, a "plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment." Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997). In addition, Plaintiff has failed to identify any actors who allegedly stopped and frisked him and acted with such intent.

The Amended Complaint does not specifically allege a violation of Equal Protection. Nonetheless, as a variation on his Section 1981 claim, Plaintiff mentions the Equal Protection Clause of the Fourteenth Amendment in footnote five, paragraph 79, of the Amended Complaint. In order to establish a violation of equal protection based upon selective treatment, a plaintiff must show that he or she was (1) selectively treated as compared with others similarly situated, and (2) that such selective treatment was based on "impermissible considerations such as

race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Latrieste Restaurant & Cabaret Inc. v. Village of Port Chester, 40 F.3d 587, 590 (2d Cir. 1994). The evidence offered is devoid of any proof that Plaintiff was selectively treated as compared with others similarly situated because Plaintiff has failed to offer any evidence of how anyone else is treated (except the one subject of the tape recording he added to the record). For this reason, any equal protection claim that Plaintiff attempts to make fails for not having been sufficiently supported by evidence or even allegations.

For these reasons, I respectfully recommend that summary judgment be granted to Defendants on these claims.

VI. Plaintiff's State Law Claims

Plaintiff brings claims under the New York State Constitution and for common law false arrest, battery, assault, negligence and possibly respondeat superior. See Am. Compl. ¶¶ 121-132. Each of these claims is levied against "the New York Police Department, who is liable for its negligent and reckless failure to train their employees and/or failure to modify department policy, against Raymond Kelly in his individual capacity, and against each of the four OFFICERS in their individual capacities." Am. Compl. ¶¶ 123, 125, 128, 132.

I respectfully recommend that summary judgment be granted to Defendants on each of Plaintiff's state law claims. Under the summary judgment standard, sufficient pleading of each state law claim would require that Plaintiff raise a genuine issue of material fact as to the underlying incident. What is fatal in that regard as to all of Plaintiff's state law claims is that he has not identified a single individual who allegedly illegally stopped and frisked him.

A. False Arrest

Under New York law, Plaintiff's claim of common law false arrest requires that he prove that (1) the defendant intended to confine the plaintiff; (2) the plaintiff was aware of the resulting confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged. See Washington-Herrera v. Town of Greenburgh, 2012 WL 6604695, at *1, 956 N.Y.S.2d 487, 489 (N.Y.A.D. 2 Dept. 2012). Here, Plaintiff does not identify any individual who allegedly confined him. As mentioned above, he voluntarily dismissed the John Doe officers, and he has not named any of them. Therefore, there is no genuine issue of material fact as to any individual who confined Plaintiff.

B. Assault & Battery

Plaintiff's claim of common law assault requires that he prove that another person placed him in fear of imminent harmful or offensive contact. See United Nat. Ins. v. Waterfront NY Realty Corp., 994 F.2d 105, 108 (2d Cir. 1993). His claim of battery requires that he prove (1) bodily contact, (2) that was offensive, (3) that was wrongful under all of the circumstances, and (4) intent to make the contact without the plaintiff's consent. See Holland v. City of Poughkeepsie, 90 A.D.3d 841, 846, 935 N.Y.S.2d 583, 590 (N.Y.A.D. 2 Dept. 2011). Here, again, Plaintiff has failed to identify any actor who allegedly put him in fear of wrongful and offensive bodily contact or made bodily contact with him. He fails to raise an issue of material fact that any particular person committed common law assault or battery against him.

C. Respondeat Superior

To the extent that Plaintiff attempts to make out a claim based upon respondeat superior, this claim also fails. "Under the doctrine of respondeat superior, an employer can be held vicariously liable for the torts committed by an employee acting within the scope of the employment." Fernandez v. Rustic Inn, Inc., 60 A.D.3d 893, 896, 876 N.Y.S.2d 99, 102 (N.Y.A.D. 2 Dept. 2009); see Judith M. v. Sisters of Charity Hosp., 93 N.Y.2d 932, 933, 693 N.Y.S.2d 67, 68 (N.Y.A.D. 2 Dept. 1999). "When the

doctrine of respondeat superior is invoked, it must be shown that the person committing the act was an employee of the party sought to be charged . . . ." N.Y. Jur. 2d Government Tort Liability § 41 at 479 (2010).

Here, Plaintiff fails to identify any particular employees working for Commissioner Kelly or the New York Police Department who allegedly violated his rights, as discussed in Section IV.A. In fact, he voluntarily dismissed the John Doe officers. See DE [39]. The lack of the identity of any individual or status as an employee of the N.Y.P.D. who committed the alleged torts is fatal to his claim.

D. Negligence Claims

Plaintiff names Commissioner Kelly, but he does not allege that Commissioner Kelly personally committed the above-listed common law torts. Rather, he claims that the New York Police Department "is liable for its negligent and reckless failure to train their employees." Am. Compl. ¶¶ 125, 128. Under New York law, "[t]o establish a cause of action based on negligent hiring, negligent retention, or negligent supervision, it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury." Shor v. Touch–N–Go Farms, Inc., 89 A.D.3d 830, 831, 933 N.Y.S.2d 686, 688 (N.Y.A.D. 2 Dept. 2011); see Jackson v. N.Y. Univ. Downtown Hosp., 69 A.D.3d 801, 801, 893 N.Y.S.2d 235, 235

(N.Y.A.D. 2 Dept. 2010). Here, a cause of action based upon negligent hiring, retention or supervision cannot be maintained because there are no New York Police officers who remain in the case or who were identified. Therefore, it cannot be shown that the New York Police Department or Commissioner knew of any employee's propensity to illegally stop-and-frisk citizens, nor has Plaintiff offered any sufficient evidence in that regard.

Plaintiff also alleges that Commissioner Kelly and the City of New York are responsible for the above-noted torts because of the N.Y.P.D.'s "failure to modify department policy." Am. Compl. ¶¶ 125, 132. This argument fails because Plaintiff identifies no specific policy that is responsible for his alleged state law violation. He merely attaches information about "stop-and-frisk" as Exhibits A-C of his amended complaint. This is not evidence, but, rather, simply inadmissible information that is inadequate to prove a policy claim. Compare, Stauber v. City of N.Y., No. 3-cv-9162-9164 (RWS), 2004 WL 1593870 (S.D.N.Y. July 19, 2004)(challenging specific city policy with detailed evidence).

Furthermore, in the case at hand, Plaintiff lacks standing to challenge any policy that he attempts to identify as causative of his alleged state law violations. As discussed in Section IV.E, the cases in which "stop-and-frisk" has been challenged and the information upon which Plaintiff relies

involve racial minority members as plaintiffs. Aside from Plaintiff's failure to adequately identify a policy that the New York Police Department should modify, he, as a Caucasian male, lacks standing to challenge any of the stop-and-frisk policies to which he refers in his attachments. For these reasons, Plaintiff's claim that the City of New York or Commissioner Kelly failed to modify a City policy fails.

E. Claim Under the New York State Constitution

Plaintiff's claim under the New York State Constitution, Article I, Section 12, fail because it is based upon an alleged illegal search and seizure, for which Plaintiff also claims entitlement to relief under the Fourth Amendment to the U.S. Constitution. Courts have held that duplicate relief is unavailable where the Federal Constitution already protects the rights protected under the state constitution. See Malay v. City of Syracuse, 638 F. Supp. 2d 303, 316 (N.D.N.Y. 2009) (dismissing plaintiff's claims under the New York State Constitution because plaintiff had an adequate federal remedy for violation of her state constitutional rights). Since Plaintiff has an adequate federal remedy to the alleged illegal search and seizure under the Fourth Amendment to the United States Constitution (which is analogous to the section of the New York State Constitution under which Plaintiff seeks relief), Plaintiff's claim under the New York State Constitution fails.

For the above-stated reasons, I respectfully recommend that summary judgment be granted to Defendants on all of Plaintiff's state law claims.

VII. Plaintiff's Motion For Injunctive Relief

Plaintiff requests an injunction requiring that a memo be sent to all officers in the N.Y.P.D. directing that reasonable suspicion is required to detain an individual, that an articulable reason that the individual is armed and dangerous is required to non-consensually search him, and that such a search must be brief and limited to identifying weapons only. Plaintiff further describes the specific content of the memo that he is requesting. See Plaintiff's Motion for Preliminary Injunction with Incorporated Memorandum, DE [52], at 4. Plaintiff also seeks, as injunctive relief, that the police set up a system by which officers may anonymously report abuse of the stop-and-frisk system, both in the form of (1) abuse on the streets, and (2) supervisors mandating abuse. This system must include an Internet-based means and a postal mail-based means of reporting, and shall be public record and be able to be used as discoverable evidence for this and other trials. See id.

Defendants claim that Plaintiff's motion for a preliminary injunction should be denied because Plaintiff has failed to set forth a valid argument for injunctive relief: Plaintiff has failed to demonstrate irreparable harm, a likelihood of success

on the merits, and that the public interest weighs in favor of granting an injunction.

I respectfully recommend that Plaintiff's request for a preliminary injunction should be denied for the following reasons. First, "[a] preliminary injunction is an extraordinary remedy never awarded as of right." Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). A party seeking a preliminary injunction has the burden of establishing (1) irreparable harm, (2) a likelihood of success on the merits, (3) a balance of hardships tipping decidedly toward the party requesting the preliminary relief, and (4) that the public's interest weighs in favor of granting an injunction. See Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. 365, 374 (2008). Furthermore,

> when the moving party seeks a "mandatory" injunction, that is, an injunction that commands action rather than merely prohibiting it, the standard is higher, '[W]here 'the injunction sought will alter rather than maintain the status quo,' the movant must show [a] 'clear' or 'substantial' likelihood of success.

Ligon, 2013 WL 71800, at *3 (quoting Rodriguez v. DeBuono, 175 F.3d 227, 233 (2d Cir. 1999)). Here, as Plaintiff is requesting an injunction to compel the N.Y.P.D. to implement new systems and policies (a "mandatory" injunction), Plaintiff needs to satisfy this higher burden in order to obtain relief. Plaintiff

fails to satisfy each of the above elements for a valid claim for injunctive relief.

To establish irreparable harm, "a party seeking preliminary injunctive relief must show 'that there is a continuing harm which cannot be adequately redressed by final relief on the merits' and for which 'money damages cannot provide adequate compensation.'" Bulman v. 2BKCO, Inc., 12 CV 4859 (RJS), 2012 WL 3100837, at *9 (S.D.N.Y. July 23, 2012). Plaintiff merely alleges possible future harm, which is insufficient to merit relief. The Supreme Court, in Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. 365, 367 (2008), held that, to prevail on a motion for injunctive relief, a movant must demonstrate that irreparable injury is likely in the absence of an injunction, not merely possible. Here, Plaintiff alleges as "irreparable harm" the contention that he no longer walks the streets of Brooklyn at night due to his fear of arrest. He further claims that the presence of N.Y.P.D. officers provokes fear in him. See Plaintiff's Motion for Preliminary Injunction with Incorporated Memorandum, DE [52], at 3. Plaintiff admits that he does not live in New York City. See Am. Compl. ¶ 5. There is no imminent threat of Plaintiff being stopped and frisked by police officers in New York. Plaintiff's unsubstantiated claims of fear do not rise to the level of

irreparable harm. For these same reasons, the balance of hardships does not tip in his favor.

Plaintiff also fails to show a likelihood of success on the merits. See New York Civil Liberties Union v. N.Y.C. Transit Auth., 675 F. Supp. 2d 411, 422 (S.D.N.Y. 2009). "In order to prevail on its motion for a preliminary injunction, a plaintiff must establish by a clear showing that it will suffer irreparable harm if the requested relief is denied, and there is a substantial or clear likelihood that Plaintiff will succeed on the merits of its claims." Id. Plaintiff does not claim that he has any evidence of the alleged violations (other than his own contradictory testimony) or any witnesses. See generally Am. Compl. As discussed above, it is respectfully recommended that this Court grant summary judgment in favor of Defendants. As Plaintiff's claims will not likely survive summary judgment, there is no likelihood of Plaintiff's success on the merits and certainly no substantial likelihood of success on the merits.

A plaintiff seeking a preliminary injunction must establish that an injunction is in the public interest. See Winter, 129 S. Ct. at 375. Plaintiff, in his brief, does not make any credible argument explaining why the public interest weighs in favor of granting his motion. He speaks in generalities about how the public has an undeniable interest in seeing the N.Y.P.D. follow the law. See Plaintiff's Reply to Defendant's Opposition

to Plaintiff's Motion for Leave to File Supplemental Evidence, DE [56] at 7. Defendants do not disagree with this position. However, Mr. Corbett does not explain how the specific policies that he wishes for the Police Department to be compelled to adopt satisfy the public interest.[8] He also does not address the practical difficulties in adopting a program of new policies based on this inadequate record. Moreover, the legal standards he proposes be required of officers do not accurately state the law. See DE [52] at 4.

I thus respectfully recommend that Plaintiff's motion for a preliminary injunction be denied.

VIII. Plaintiff's Motion For Leave To File A Second Amended Complaint

Plaintiff filed this action on July 20, 2011, naming the City of New York and four "John Doe" officers of the New York

[8] In contrast, in a recent case, Ligon v. City of New York, 12-CV-2274 (SAS), 2013 WL 71800 (S.D.N.Y. Jan. 8, 2013), a preliminary injunction prohibiting the New York City Police Department from performing trespass stops outside certain buildings was granted. In Ligon, the plaintiffs, all African-American or Latino residents of New York City, complained of unconstitutional trespass stops performed by the New York City Police Department at certain buildings in the Bronx. See id. at *2. The record included expert testimony that convinced the court that the allegedly illegal stops were occurring. See id. at *28-34. In Ligon, the court found that the elements necessary for the granting of injunctive relief were met and ordered that the New York City Police Department immediately cease performing trespass stops at those buildings without reasonable suspicion of trespass. See id. at *41. The court also proposed additional relief, consolidating the remedies hearing in Ligon with that of Floyd. See id. at *2.

Police Department. An amended complaint was filed February 24, 2012, see DE [26], adding Defendant N.Y.P.D. Commissioner Raymond Kelly. A partial notice of voluntary dismissal was filed on June 20, 2012, dismissing the John Doe defendants after attempts to identify them were unsuccessful. See DE [39]. Plaintiff now moves to further amend the complaint and to remove the John Doe Officers. See Plaintiff's Motion for Leave to File Second Amended Complaint with Incorporated Memorandum at 1, DE [51]. Plaintiff wishes to amend the complaint because, without the four unnamed officers, his pleadings need to be amplified to establish municipal liability. See id. Defendants claim that Plaintiff's motion to amend should be denied because it would be futile. See City Defendants' Memorandum of Law in Support of Their Motion to Oppose Plaintiff's Request for a Preliminary Injunction and Leave to File a Second Amended Complaint and Cross-Motion for Summary Judgment, 12-14, DE [49].

FRCP 15 (a)(2) states "[i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." However, a motion to amend should be denied if the amendment would be futile, cause undue delay, or cause undue prejudice. See Dluhos v. Floating & Abandoned Vessel Known as "New York", 162 F.3d 63, 69 (2d Cir. 1998).

As to the John Doe amendment, it is superfluous because these defendants have been dismissed. See DE [39] As to the municipal policy claim, the proposed amendment would be futile because, without the identity of the police officers alleged to be involved in the illegal stop-and-frisk, there is no basis for Plaintiff's constitutional or state law claims. A rational jury would not believe that Mr. Corbett suffered a violation of his constitutional rights at the hands of police officers and therefore could not find any supervisory or municipal liability for this alleged infraction.

Prejudice to the opposing party is an important consideration in ruling on a Rule 15(a) motion. See, e.g., New Hampshire Ins. Co. v. Total Tool Supply, 621 F. Supp. 2d 121, 123 (S.D.N.Y. 2009). Here, the City Defendants would be prejudiced by the proposed amendment because over one year has passed since the filing of the initial complaint. Discovery has closed. Photo arrays did not aid Plaintiff in identifying the officers who allegedly stopped and frisked him. Plaintiff could have moved to amend the complaint prior to the end of discovery, but he did not do so. Defendants have moved for summary judgment in accordance with the established briefing schedule and would need to file yet another dispositive motion in response to any further amended complaint.

Because it would be futile to further amend the complaint and because it would unduly prejudice Defendants, I respectfully recommend that Plaintiff's motion for leave to file a second amended complaint be denied.

IX. Conclusion

For the reasons stated above, I respectfully recommend that the District Court:

1. Grant Plaintiff's motion for leave to file supplemental evidence.
2. Grant summary judgment to Defendants on all of Plaintiff's claims.
3. Deny Plaintiff's request for a preliminary injunction.
4. Deny Plaintiff's motion for leave to file a second amended complaint.

X. Objections

Any objection to this Report and Recommendation must be filed with the Clerk of the Court with a courtesy copy to the Honorable Carol B. Amon on or before March 1, 2013.[9] Failure to file timely objections may waive the right to appeal the District Court's Order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72.

Dated: February 15, 2013
Brooklyn, New York

/s/
VERA M. SCANLON
UNITED STATES MAGISTRATE JUDGE

[9] The Court notes that although he is pro se, Mr. Corbett has ECF filing privileges and will receive this Report and Recommendation via the Court's system.