UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES CERISIER, Plaintiff, -against- THE CITY OF NEW YORK and NYPD OFFICER SAURABH SHAH, in his individual capacity, Defendants.	:	MEMORANDUM & ORDER 19-cv-3850 (ENV) (JRC)

VITALIANO, D.J.

Empowered by 42 U.S.C. § 1983, plaintiff James Cerisier brings this civil rights action against NYPD Officer Saurabh Shah and the City of New York (the "City"), alleging that Officer Shah committed assault and used excessive force, in violation of the Fourth Amendment, by pointing a loaded gun at him during a traffic stop. Defendants now move for summary judgment. For the reasons set forth below, the motion is granted.

Background[1]

On the morning of January 28, 2019, Cerisier was driving north on the Brooklyn-Queens Expressway ("BQE"), from his home in Flatbush, Brooklyn into Manhattan, where he worked as a public school teacher. Defs. SOF ¶ 12. When he set out for work that day, he planned to take the BQE to the Brooklyn Battery Tunnel route. Plans, though, often fall victim to City traffic. They did that day. As Cerisier approached the fork separating tunnel traffic from traffic heading towards the Brooklyn Bridge, he changed his mind and decided to enter Manhattan via the

[1] The facts are drawn from the affidavits, exhibits, and Local Rule 56.1 statements of material fact submitted by the parties. *See* Defs. SOF, Dkt. 34-3; Pl. CSOF, Dkt. 34-13. Factual disputes are noted and, where facts are disputed, "the sources for the claims made in dueling Rule 56.1 Statements" will be considered directly. *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 396 (S.D.N.Y. 2015).

Brooklyn Bridge. *Id.* ¶¶ 12–14. Cerisier activated his turn signal and, when a gap in traffic appeared, drove across the solid double lines separating the two traffic patterns into the lanes heading towards the Brooklyn Bridge. *Id.* ¶¶ 15–18. It is undisputed that, in doing so, Cerisier committed a traffic infraction in violation of N.Y. Veh. & Traf. L. § 1110(a). *Id.* ¶ 39.

At the time, Officer Shah was conducting traffic enforcement, by himself, near the Brooklyn Bridge lanes of the BQE. *Id.* ¶ 20. His patrol car was parked in the median that separated the two Brooklyn Bridge BQE lanes (to the left of the median) from the Hamilton Avenue exit lane (to the right of the median), but he was conducting traffic enforcement on foot, outside of his patrol car. *Id.* ¶¶ 21, 28. Officer Shah was not wearing a bodycam during this incident; however, his patrol car was equipped with a camera on the dashboard that captured portions of the interaction between himself and plaintiff. From the dashcam footage and deposition testimony of Cerisier and Officer Shaw emerge the following facts, all of which are beyond reasonable dispute:

(1) At approximately 7:45 a.m., Officer Shah is shown walking from the median—where a vehicle he had just detained was still parked—into the Brooklyn Bridge traffic lanes, outside the view of the dashcam. *Id.* ¶ 33. When Officer Shah stepped out of the dashcam video frame, he was not holding his service weapon. While standing in the Brooklyn Bridge traffic lane furthest from the median, Officer Shah observed Cerisier cross the solid line and continue driving towards him at a speed of approximately 25 miles per hour. *Id.* ¶¶ 40, 42;

(2) Plaintiff first saw Officer Shah "seconds" after he committed the infraction. He would manage to stop his car within "a few seconds" of noticing the officer. At about the same time, Officer Shah was directing him to pull over. *Id.* ¶¶ 47, 49. After a few additional "seconds," as plaintiff was starting to drive towards the median but before he had

switched lanes, Officer Shah, using his right hand, drew his loaded service weapon and pointed it at plaintiff's windshield. *Id.* ¶¶ 53, 55–57, 80–82. All told, Cerisier estimated, and defendants do not dispute, that approximately 5 to 10 seconds elapsed between him noticing the officer and the officer drawing his weapon; and

(3) Officer Shah kept his service weapon pointed at plaintiff's windshield for approximately 7 to 10 seconds, until plaintiff had stopped his vehicle on the median. *Id.* ¶ 58. During this time, Officer Shah ordered Cerisier to "pull over" six times and directed plaintiff's car towards the median with his left hand. *Id.* ¶¶ 59–60. When Cerisier had come to a stop, Officer Shah then holstered his service weapon and walked to the driver's side window of Cerisier's vehicle. After speaking with Cerisier for approximately one minute, Officer Shah told plaintiff to drive safely and let him go with a warning. *Id.* ¶ 68.

Cerisier commenced this action on July 2, 2019. *See* Dkt. 1. His amended complaint brings causes of action for excessive force, in violation of the Fourth Amendment, and common law assault. *See* Dkt. 34-5. Defendants now seek summary judgment, principally contending that Officer Shah's use of force during the January 28, 2019 traffic stop was reasonable and, in any event, he is protected by qualified immunity.

Legal Standard

Summary judgment shall be granted in the absence of a genuine dispute as to any material fact and upon a showing that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "[A] fact is material if it 'might affect the outcome of the suit under the governing law.'" *Royal Crown Day Care LLC v. Dep't of Health & Mental Hygiene of N.Y.*, 746 F.3d 538, 544 (2d Cir. 2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Courts do not try issues of fact at the summary judgment

stage, but instead merely "determine whether there are issues of fact to be tried." *Sutera v. Schering Corp.*, 73 F.3d 13, 16 (2d Cir. 1995) (quoting *Katz v. Goodyear Tire & Rubber Co.*, 737 F.2d 238, 244 (2d Cir. 1984)).

The movant carries the burden of demonstrating that there is no genuine dispute as to any material fact, *see Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005), and the court will resolve all ambiguities and draw all permissible factual inferences in the light most favorable to the party opposing the motion, *see Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc.*, 391 F.3d 77, 83 (2d Cir. 2004). Where the nonmoving party "will bear the burden of proof at trial," it bears the initial procedural burden at summary judgment of demonstrating that undisputed facts "establish the existence of [each] element essential to that party's case." *Celotex Corp.*, 477 U.S. at 322–23. "If, as to the issue on which summary judgment is sought, there is any evidence in the record from which a reasonable inference could be drawn in favor of the opposing party, summary judgment is improper." *Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28, 33 (2d Cir. 1997).

Discussion

The Fourth Amendment prohibits the use of excessive force by a police officer effecting an arrest. *Tracy v. Freshwater*, 623 F.3d 90, 96 (2d Cir. 2010). In evaluating an excessive force claim, the central question is "whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989) (quotations omitted). The reasonableness of an officer's force depends on the totality of the circumstances and involves a "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* (cleaned up).

The *Graham* excessive force continuum "is not marked by visible signposts." *Brown v. City of New York*, 798 F.3d 94, 103 (2d Cir. 2015). Instead, whether an officer's conduct violates the Fourth Amendment is a context-specific decision that "requires careful attention to the facts and circumstances of each particular case," including (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting or attempting to evade arrest. *Graham*, 490 U.S. at 396. This standard is objective; "the officer's state of mind, whether evil or benign, is not relevant." *Brown*, 798 F.3d at 100–01. Reasonableness must also be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

As might be surmised from the background facts, it is undisputed that the severity of Cerisier's minor traffic violation was exceedingly low—so low, in fact, that Officer Shah released Cerisier, without issuing a citation, approximately two minutes after he was first detained. *See Brown*, 798 F.3d at 102; *Gonzalez v. City of New York*, 2000 WL 516682 (E.D.N.Y. March 7, 2000). As for the remaining two *Graham* factors, while most of the post-violation facts are not in serious dispute, the conclusions that the parties draw from them undoubtedly are.

Suffice it to say, defendants contend that these two factors weigh in Officer Shah's favor, at least sufficiently enough to warrant judgment on qualified immunity grounds as a matter of law. Yet, the specific details concerning the purported threat posed by Cerisier and his apparent attempt to flee are hazy and are handicapped by the notorious inability of witnesses to accurately observe and recall the speed or elapsed travel time of a vehicle moving, by all accounts, briefly on a highway. Indeed, taking stock of the well-known configuration of the often-violated median separating traffic bound for the Brooklyn Battery Tunnel from traffic bound for the

Brooklyn Bridge, the time and distance estimates provided by the parties—even those that remain undisputed—are questionable, at best.

What emerges as factually undisputed, however, is that Cerisier did see Officer Shah standing in the highway lane moments after he committed a traffic violation and continued to drive in the officer's direction before coming to a stop on the median, as he was ordered to do by Officer Shah. It was during these moments that Officer Shah, afraid, he claims, that Cerisier might be attempting to hit him or perhaps flee, drew his service revolver and pointed it at Cerisier's windshield for no more than ten seconds.

Even still, on this record, there is a genuine issue of material fact as to whether an objectively reasonable officer would believe that Cerisier was posing an immediate risk of harm or attempting to flee the scene. Cerisier's estimated speed and proximity to the officer, without more, do not command the conclusion that he was attempting to hit the officer or flee the scene. What precipitates is a genuine dispute as to whether Cerisier's failure to pull over within 10 or so seconds of seeing Officer Shah constituted a threat to his safety, such that it was reasonable for the officer to draw his service weapon. Further complicating the reasonableness inquiry, Cerisier points out that it is undisputed Officer Shah did not draw his weapon until he had stopped the car, equating the stop to an abatement of any *immediate* risk of him hitting the officer or fleeing the scene. *Graham*, 490 U.S. at 369; *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756, 762 (2d Cir. 2003) (affirming denial of summary judgment where defendant-officer was not in danger).

Ordinarily, a finding that material facts are genuinely in dispute would put an end to the movant's hope for summary judgment. Not here. Irrespective of the dispute surrounding the substantive question of liability, defendants are still entitled to judgment if Officer Shah is protected by qualified immunity. *See Stephenson v. Doe*, 332 F.3d 68, 77 (2d Cir. 2003)

("[E]ven officers who are found to have used excessive force may be entitled through the qualified immunity doctrine to an extra layer of protection from the sometimes hazy border between excessive and acceptable force." (cleaned up)).

It is well-established that the doctrine of qualified immunity shields government officials from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (cleaned up). It is not "identified by reference to how courts or lawyers might have understood the state of the law," nor is it sufficient when a right has been only "established generally or in a context distinct from that at issue." *Barboza v. D'Agata*, 676 F. App'x 9, 12 (2d Cir. 2017). There need not be a "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al–Kidd,* 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011).

Within the Fourth Amendment context, several courts in this Circuit have held "verbal threats, combined with the brandishing of the weapon, could be unreasonable and therefore constitute excessive force." *Green v. City of Mount Vernon*, 96 F. Supp. 3d 263, 296 (S.D.N.Y. 2015); *Merrill v. Schell*, 279 F. Supp. 3d 438, 443–44 (W.D.N.Y. 2017) (denying motion to dismiss where police officer "drew his weapon, pointed it at" the plaintiff's head, who was unarmed, handcuffed, and in the back of a police car, "and directed him to stop seeking custody of his daughter and pay child support."); *Othman v. City of New York*, 2018 WL 1701930, at *8 (E.D.N.Y. Mar. 31, 2018) (noting the possibility of excessive, non-physical force, but granting summary judgment because the officers did not "point[] their guns at [the plaintiff] in a

constitutionally excessive manner"); *Lilakos v. New York City*, 2016 WL 5928674, at *6 (E.D.N.Y. Sept. 30, 2016) (denying motion to dismiss where officers screamed at plaintiff and "threatened to hurt [him] with his gun if he didn't stay on his knees"); *Marceline v. Delgado*, 2011 WL 2531081, at *8 (D. Conn. June 23, 2011) ("[T]he Court does not view the lack of physical contact between Plaintiffs and [the defendant-officer] as detrimental to Plaintiffs' claim for excessive force."). Likewise, other circuits "have recognized excessive-force claims in the absence of physical contact, particularly in cases where, as here, there were allegations that officers unreasonably drew their firearms." *Marceline*, 2011 WL 2531081, at *8; *Snoussi v. Bivona*, 2008 WL 3992157 at *6 (E.D.N.Y. Aug. 22, 2008) (collecting out-of-circuit decisions).

As a prefatory matter, however, this line of authority does not resolve the constitutional inquiry presented here. Unlike the conduct under scrutiny in those cases, Cerisier makes no allegation of verbal threats, nor does the record suggest that any were ever made by Officer Shah; the only complained-of conduct is the brandishing of his loaded service weapon. Resultingly, none of those cases can be found to have clearly established the constitutionality of the particular type of force alleged here. *See Jones v. Treubig*, 963 F.3d 214, 227 (2d Cir. 2020) ("[W]hether the violative nature of *particular* conduct is clearly established . . . must be undertaken in light of the specific context of the case, not as a broad general proposition." (emphasis in original) (cleaned up)).

Even if these cases were analogous, it would not change the qualified immunity calculus. The distinctly prevailing view among post-*Graham* courts is that threats of force, including the drawing of a firearm, do not constitute excessive force. *See, e.g.*, *Pierre v. City of New York*, 531 F. Supp. 3d 620, 627 (E.D.N.Y. 2021); *Cabral v. City of New York*, 2014 WL 4636433, at *11 (S.D.N.Y. Sept. 17, 2014), *adhered to*, 2015 WL 4750675 (S.D.N.Y. Aug. 11, 2015), *and aff'd*, 662 F. App'x 11 (2d Cir. 2016); *Dunkelberger v. Dunkelberger*, 2015 WL 5730605, at *15

(S.D.N.Y. Sept. 30, 2015) (collecting cases). Consistent with this majority approach, the Second Circuit recently held, in a non-precedential summary order, that for purposes of qualified immunity, "neither the Supreme Court, nor [the Second Circuit], has clearly established that a verbal threat combined with a display of a firearm, without any physical contact, constitutes excessive force." *Gerard v. City of New York*, 843 F. App'x 380, 382 (2d Cir. 2021) (affirming § 1983 dismissal based on qualified immunity). This holding is even more compelling in this case, where there was neither physical contact nor verbal threats.

Cerisier, for his part, counters that notwithstanding this predominant view, decisions by this and other circuits "clearly foreshadow a particular ruling" that brandishing a loaded weapon, without more, can violate the Fourth Amendment. Although it is true that the Second Circuit has recognized, in dicta, that "Circuit law *could* very well support [a] claim that a gunpoint death threat issued to a restrained and unresisting arrestee represents excessive force," *Mills v. Fenger*, 216 F. App'x 7, 9–10 (2d Cir. 2006) (emphasis added), the *Gerard* court recently noted—albeit, somewhat ironically—that "*Mills* is a non-precedential summary order that cannot clearly establish the law for qualified immunity purposes." *Gerard*, 843 F. App'x at 382–83 (cleaned up). And both *Gerard* and other recent cases in this Circuit reinforce courts' ongoing reluctance to even acknowledge, let alone apply, the very rule plaintiff claims to be "clearly established." *See id.* at 382; *Pierre*, 531 F. Supp. 3d at 627.

To summarize, Officer Shah did not violate a clearly established right, and his conduct is protected under the doctrine of qualified immunity. Accordingly, defendants are entitled to summary judgment on Cerisier's § 1983 excessive force claim. Because no federal claim survives summary judgment, the Court declines to exercise supplemental jurisdiction over plaintiff's remaining state law assault claim against defendants. *See, e.g.*, *Cohen v. Postal*

Holdings, LLC, 873 F.3d 394, 405 (2d Cir. 2017); *Gerard v. City of New York*, 2019 WL 4194220, at *6 (S.D.N.Y. Sept. 3, 2019), *aff'd*, 843 F. App'x 380 (2d Cir. 2021).

Conclusion

For the foregoing reasons, defendants' motion for summary judgment is granted as to plaintiff's § 1983 claim. The Court declines to exercise supplemental jurisdiction, under 28 U.S.C. § 1367, over plaintiff's remaining state law assault claim, which is dismissed without prejudice and with leave to replead in a state court of appropriate jurisdiction and in conformity with applicable New York law and rules.

The Clerk of Court is directed to enter judgment accordingly and to close this case.

So Ordered.

Dated: Brooklyn, New York
June 28, 2022

/s/ Eric N. Vitaliano
ERIC N. VITALIANO
United States District Judge