

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CRAIG ALEXANDER,

Plaintiff,

-VS-

**STATE OF NEW YORK; ONEIDA INDIAN
NATION POLICE; ANDREW WILMONT, NYS
Police Investigator; FNU O'HANLON, NYS Police
Officer; UNKNOWN POLICE OFFICER #1;
UNKNOWN STATE POLICE OFFICER #2;
ROBERT NOLAN, Oneida Indian Nation Police
Investigator; DAVID JONES, Oneida Indian
Nation Police Officer; and ONEIDA INDIAN
NATION POLICE BUREAU OF
INVESTIGATION,**

Defendants.

Civil Action No.
6:17-CV-0725
(GTS/ATB)

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

BARCLAY DAMON LLP
Attorneys for Defendants
Robert Nolan and David Jones
Barclay Damon Tower
125 East Jefferson Street
Syracuse, New York 13202
Telephone: (315) 425-2836

**GABRIEL M. NUGENT
CASSANDRA L. SANTORO**
Of Counsel

PRELIMINARY STATEMENT

Defendants Robert Nolan (“Officer Nolan”) and David Jones (“Officer Jones”) (collectively, “Defendants”) respectfully submit this reply memorandum of law in further support of their motion for summary judgment seeking dismissal of Plaintiff Craig Alexander’s (“Plaintiff”) Complaint alleging an excessive force cause of action under 42 U.S.C. § 1983.

Defendants’ motion was supported by clear and unchallenged video evidence and multiple testimonial admissions by Plaintiff. This evidence demonstrated Plaintiff was reasonably approached, apprehended and searched by Defendants, with little to no physical struggle or force. The evidence conclusively refuted the allegations in Plaintiff’s Complaint and left no factual disputes to be resolved by a jury.

In his opposition, Plaintiff produced no contradictory evidence, but offered his own characterization of the video evidence – “Officer Jones brutally smash[ed] Plaintiff’s head into the floor after he had already been subdued” – in an attempt to generate a factual dispute. [Dkt. 23, pp. 2-3.] However, the video evidence, and Plaintiff’s admission that he suffered no injury, not even a superficial one, reveal this characterization to be false.

Not only does Plaintiff fail to offer evidence of a factual dispute, but he also admits he has failed to satisfy the physical injury element of his excessive force claim. Accordingly, his Complaint against Defendants should be dismissed.

ARGUMENT

I. PLAINTIFF FAILS TO IDENTIFY A MATERIAL FACT IN DISPUTE.

Summary judgment may be granted if the movant demonstrates there is no material fact in dispute, as Defendants have done with the video evidence and Plaintiff's admissions. *See* Fed. R. Civ. P. 56. Plaintiff's opposition fails to identify new or contradictory evidence.¹ [Dkt. 23.] In fact, Plaintiff admitted in his opposition that he ran from Defendants, and that it was reasonable for Defendants to pursue and apprehend him. [Dkt. 23, p. 2.]

The sole difference between Plaintiff's version of events and what is supported by the evidence is Plaintiff's claim that a one-second portion of the video evidence shows Officer Jones "brutally smash[ing] Plaintiff's head into the floor"² after he had already been subdued." [Dkt. 23, pp. 2-3.] Plaintiff claims the alleged head-smashing "is conveniently absent from Defendants' motion and version of events," and that Defendants "attempt to slip that fact past this court." [Dkt. 23, p. 3.]

However, Defendants provided all video footage in their possession to the Court. The brief, methodical, and largely peaceful apprehension depicted in the video is simply not susceptible to Plaintiff's dramatic interpretation. If Plaintiff had been handled with the brutality he describes, there would be some evidence of an injury, even if superficial. But, Plaintiff admitted he suffered no injuries – not even "breaks or bruising." [Dkt. 17-3, p. 38.]

Plaintiff is not alleging a disputed material fact, or challenging the veracity of the evidence offered by Defendants. He is simply offering an unreasonable characterization of the

¹ Plaintiff submitted no sworn declaration or other admissible evidence with his opposition.

² This new allegation was not part of Plaintiff's Complaint. In his Complaint, Plaintiff claimed *Officer Nolan* "slammed [his] face *into the wall*" inside a bathroom. [Dkt. 1, p. 5 (emphasis added).] He now claims *Officer Jones* slammed his head *into the floor*.

evidence. As in other cases involving clear and unrefuted video evidence, the Court may grant summary judgment on this record. *See, e.g., Kalfus v. New York & Presbyterian Hosp.*, 476 Fed. Appx. 877, 880-81 (2d Cir. 2012) (affirming summary judgment because “[n]o reasonable factfinder could conclude that such actions were excessive in the circumstances” based on video recording showing the arrest); *Mei Ling Lin v. City of New York*, No. 14 Civ. 9994 (PAE), 2016 U.S. Dist. LEXIS 177046, at *33-35 (Dec. 21, 2016 S.D.N.Y.) (“To the extent Lin’s claims of excessive force are based on the officers’ handcuffing of Lin and her fall, the video defeats these claims. . . . [T]he video evidence unavoidably shows that the force used was constitutionally reasonable.”); *Reeder v. Hogan*, No. 9:09-CV-520 (NAM/ATB), 2013 U.S. Dist. LEXIS 82232, at *13 (May 17, 2013 N.D.N.Y.) (dismissing excessive force claim because “no reasonable finder of fact would credit plaintiff’s claims that he was compliant with orders to exit his cell peacefully” when video evidence corroborates that plaintiff was not complying with orders).

“When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding officer entitled to summary judgment dismissing fourth amendment violation where video footage clearly contradicts version of events as put forth by respondent and shows the officer’s action were objectively reasonable). Because the video evidence directly refutes Plaintiff’s version of events, the Court is permitted to reject his characterization of the facts and grant summary judgment.

II. PLAINTIFF CONCEDED PHYSICAL INJURY IS AN ELEMENT OF A § 1983 CLAIM.

Even if a material factual dispute existed as to whether one of the Defendants brutally slammed Plaintiff's head into a wall or the ground – which the video directly contradicts – summary judgment still would be appropriate because Plaintiff cannot meet all required elements of his claim.

Plaintiff concedes in his opposition that a physical injury is a required element of a § 1983 excessive force claim, and that an emotional injury alone is insufficient. [Dkt. 23, p. 3.] As outlined in Defendants' moving papers, Plaintiff admitted during his deposition he suffered no physical injury as a result of the encounter. [Dkt. 17-1, pp. 12-14; Dkt. 17-2, ¶ 35.] In his opposition, Plaintiff does not walk back this testimony or otherwise challenge the evidence of no injury. On that basis alone, the Court may grant summary judgment dismissing his Complaint against Defendants.

Recognizing he cannot satisfy a required element of his claim, Plaintiff asks the Court to ignore years of precedent, change the law governing excessive force claims and let his claim survive based on an alleged undefined emotional injury. Granting this request would deviate from well-developed, controlling precedent and create an inconsistent body of law. *See, e.g., Lucente v. IBM*, 310 F.3d 243, 262-63 (2d Cir. 2002) (reversing district court decision where lower court ignored binding precedent); *Thrower v. United States*, 234 F. Supp. 3d 372, 380-83 (E.D.N.Y. 2017) (explaining that courts should apply current law and that it would be “unreliable and unfair . . . if courts were to ignore case law clarifying statutory definitions” when making a determination).

Even if the Court were inclined to consider Plaintiff's request to alter the current law and credit emotional injuries in excessive force cases, Plaintiff fails to allege an emotional injury in

his Complaint, and did not attempt to describe or define a non-physical injury in his deposition or in his opposition. The only allegations in the Complaint that even approach a description of an emotional injury concern defendants other than Officer Nolan and Officer Jones, and the claims against all other defendants have been dismissed. [Dkt. 1., p. 8; Dkt. 6, pp. 7-8.] Further, when Plaintiff was asked broadly if he sought any medical treatment following his apprehension, he responded in the negative. [Dkt. 17-2, ¶ 37.]

Finally, Plaintiff argues he is entitled to nominal damages regardless of all the other flaws in his case. However, Plaintiff cannot receive damages if he cannot establish liability. Because Plaintiff admittedly failed to satisfy the physical injury element of his claim, he cannot establish liability, and is entitled to no damages of any kind.

CONCLUSION

For all of the foregoing reasons, including those reasons set forth in their moving papers, Defendants respectfully request that the Court grant their motion for summary judgment.

DATED: July 30, 2018

BARCLAY DAMON LLP

By: s/ Gabriel M. Nugent
Gabriel M. Nugent
Bar Roll No. 513947

Cassandra L. Santoro
Bar Roll No. 520492

*Attorneys for Defendants Robert Nolan
and David Jones*

Office and Post Office Address
Barclay Damon Tower
125 East Jefferson Street
Syracuse, New York 13202
Telephone: (315) 425-2836
(315) 425-2882

Email: gnugent@barclaydamon.com
csantoro@barclaydamon.com

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2018, I electronically filed Defendant Robert Nolan and David Jones's Reply Memorandum of Law in Further Support of Defendants' Motion for Summary Judgment using the Court's CM/ECF system.

I hereby certify that I have served upon Plaintiff Craig Alexander by the United States Postal Service said document, along with true and correct copies of all unpublished opinions cited herein, to the following address:

Craig Alexander
21707-052
Fort Dix
Federal Correctional Institution
P.O. Box 2000
Joint Base MDL, New Jersey 08640

By: /s/ Gabriel M. Nugent
Gabriel M. Nugent