UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARC PIERRE.	:	
		REPORT AND RECOMMENDATION
Plaintiff,	:	12 Civ. 9462 (LAK) (GWG)
		13 Civ. 100 (LAK) (GWG)
-v.-	:	13 Civ. 3602 (LAK) (GWG)
		13 Civ. 3603 (LAK) (GWG)
THE CITY OF NEW YORK, et al.,	:	
Defendants.	:	

GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE

Defendant City of New York has moved to dismiss plaintiff Marc Pierre's consolidated pro se complaints for failure to state a claim. For the reasons stated below, the City's motion should be granted. The complaints should also be dismissed as to all other named defendants pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

I. FACTS

A. Allegations in the Complaints

Pierre has filed four complaints asserting causes of action stemming from five separate incidents.[1] The facts alleged in the complaints are accepted as true for purposes of deciding this motion to dismiss. See, e.g., Erickson v. Pardus, 551 U.S. 89, 93-94 (2007) (per curiam) (citations omitted).

1. May 4, 2012 Incident

On May 4, 2012, Pierre was "in the process of conducting business at [his] pet stand"

[1] See Complaint, filed Dec. 27, 2012 (Docket # 2 in 12 Civ. 9462) ("9462 Compl."); Complaint, filed Dec. 28, 2012 (Docket # 2 in 13 Civ. 100) ("0100 Compl"); Complaint, filed Mar. 5, 2013 (Docket # 1 in 13 Civ. 3602) ("3602 Compl."); Complaint, filed Mar. 5, 2013 (Docket # 1 in 13 Civ. 3603) ("3603 Compl.") The cases docketed as 13 Civ. 3602 and 13 Civ. 3603 were originally filed in the United States District Court for the Eastern District of New York and were transferred to this district.

where he "sold pets to teach kids about science." 0100 Compl. at 3, ¶ 1. Police Officer Davis and his partner approached Pierre and told him to "shut down [his] stand without asking to see any paper work, license or anything." Id. at 3, ¶ 2. Pierre explained to Davis that he "was a USMC veteran, [had] a license and had a right to be there." Id. When Davis insisted that Pierre leave, Pierre showed Davis his "Brooklyn Vendors Certificate License." Id. Davis "looked it over and told [Pierre] it wasn't good and that [Pierre] had to shut down." Id. at 4, ¶ 3. Pierre then protested that "with or without a license [he] had a right to be there based upon the Ninth and Tenth Amendments" and that he had also "waived all benefits from his corporation [i.e., the City of New York] and that [he] had a right to be there because [he] was Sovereign." Id. Davis looked at the license provided by Pierre, id. at 4, ¶ 4, and "[a]fter a few minutes of conferencing [the officers] approached and told [Pierre] this was [his] last chance to leave and if [he] didn't shut down they were going to arrest [him]," id. at 4, ¶ 7. A couple of minutes later "their back-up showed up and surrounded [Pierre]." Id. at 4, ¶ 8. Pierre told them "they were violating [his] constitutional rights by arresting [him] because [he] was causing no harm or being a threat to nobody." Id. He also told them he was now "under threat, duress, and coercement [sic], and if they arrested [him], and it turned out [he] was correct, and the case got dismissed [he] would sue them for 5 million dollars." Id. at 4, ¶ 9 (emphasis omitted). The officers "agreed to the deal in front of witnesses who were watching the whole thing and proceeded to handcuff [Pierre] in a manner which left indentations on [his] wrist." Id. at 4-5, ¶ 9. Pierre was then taken to the police precinct "before being processed through central booking." Id. at 5, ¶ 10. He was "charged with unlicensed vending even though [he] had a license at the time." Id. at 5, ¶ 11. After a "long wait," Pierre was taken before a judge, pled not guilty, was given a new court date, and was released on his own recognizance. Id. at 5, ¶ 12. He spent approximately 28 hours in

jail. Id. at 5, ¶ 13. The officers "confiscated all of [his] supplies, table, and all of the pets [he] was selling" which included turtles, fish, and frogs. Id. at 5, ¶ 14. However, the police did not give him a voucher, and his property was not returned to him. Id.

2. May 9, 2012 Incident

On May 9, 2012, Pierre was selling "Mother's Day cards" at a location not disclosed in the complaint when a police officer told him he had to leave. 3602 Compl. at 3, ¶ 1. Pierre responded that the cards were "covered under the [F]irst [A]mendment and that [he] could sell them in any public area," and the officer left. Id. Several minutes later, two more officers approached Pierre and "insisted that [he] had to leave." Id. at 3-4, ¶ 2. Pierre argued with the officers, protesting that his card-selling was protected by the First Amendment, but Police Officer Colon arrested Pierre anyway. Id. at 3-4, ¶¶ 2-3. Pierre was taken to the precinct, processed through central booking, charged with unlicensed vending, and brought before a judge. Id. at 4, ¶¶ 4-6. Pierre's case was dismissed, and his property was returned to him. Id. at 4, ¶ 6. He was released after approximately 30 hours in jail. Id. at 4, ¶ 7.

3. December 12, 2012 Incident

On December 12, 2012, Pierre was setting up a "stand" with unspecified wares on Flatbush Avenue in Brooklyn when he was approached by Officer Faust, who asked to see Pierre's "general vendor license." 9462 Compl. at 3, ¶ 1. Pierre explained to Faust that he "didn't need a license to sell from the City of New York" because the City is "a corporation" and Pierre was "operating in [his] sovereign capacity with unalienable rights," and because Officer Faust "didn't have any jurisdiction over [Pierre] since [Faust] works for the City of New York which is a corporation." Id. at 3, ¶¶ 2-3. When Faust asked to see Pierre's identification, Pierre responded that he had "waived all benefits from said corporation" and therefore did not have any

identification, at which point Pierre handed Faust his "Affidavit of Truth." Id. at 4, ¶ 4. Pierre's "Affidavit of Truth," which is annexed to the complaint, appears to be a form downloaded from the internet. It states, among other things, that Pierre is a "freeborn sovereign individual" who is not "subject to any entity anywhere," is not a "'person' as defined in 'statutes,'" and that laws do not have "any authority" over him.

Faust called for back-up, and Pierre showed the newly-arrived officers his Affidavit of Truth. Id. at 4, ¶ 8. He also told the officers that he was "now under threat, duress, and coercement [sic], and if they arrested [him], and it turned out [he] was correct, and the case got dismissed [,] [Pierre] would sue them for 5 million dollars." Id. (emphasis omitted). Sergeant Pirozzi told Pierre that he "didn't have a license or I.D. and had no right to be there," and then the officers handcuffed Pierre "in a manner which left indentations on [his] wrists." Id. at 4, ¶ 9. Pierre was taken to the police precinct and "processed through central booking." Id. at 4, ¶ 10. When he told the officers at the precinct that he was "operating in [his] sovereign capacity and would sue [the officers] for violating [his] unalienable rights," the officers "began to clown and make fun of" him. Id. Pierre was charged with unlicensed vending, id. at 4, ¶ 11, and after spending approximately 30 hours in jail, he was brought before a judge and his case was dismissed, id. at 5, ¶¶ 12-13

4. February 13, 2013 Incident

On February 13, 2013, at a location undisclosed in the complaint, Pierre was "in the process of conducting business at a table [he] set up in order to sell Valentine cards for the holiday" when Police Officer Perez arrived and "told [Pierre] that [he] wasn't allowed to be there and had to leave." 3603 Compl. at 3, ¶¶ 1-2. Pierre told Perez that the cards were "covered under the First Amendment" and that he was "within [his] rights selling the Valentine

cards." Id. at 3, ¶ 2. Perez told Pierre that he "had to leave and that if [Pierre] didn't [Perez] would confiscate [his] goods." Id. Pierre then produced a document from the Department of Consumer Affairs "which stated that [he] didn't need a license to sell Valentine cards because they were considered prints and artwork." Id.[2] Perez "refused to look at the document . . . and told [Pierre] that [he] had to leave or he would take [Pierre's] stuff." Id. at 4, ¶ 3. Pierre told Perez he "was sovereign and if [Perez] unlawfully removed [Pierre's] property, against [his] will, [Pierre] would sue [Perez] for 1 million dollars." Id. Perez and "his buddies" then "just stood around [Pierre's] table and stared at [him] trying to intimidate [him]." Id. About ten minutes later, a sergeant arrived, spoke to the other officers on the scene, and then approached Pierre, who showed the sergeant the document from the Department of Consumer Affairs and "explained the situation." Id. at 4, ¶ 4. The sergeant "had a conference with the cops" and then told Pierre that he "had to leave or [the police] would take [his] stuff." Id. The officers talked among themselves for about 20 minutes, and then "took [Pierre's] goods and left." Id.

5. May 11, 2013 Incident

On May 11, 2013, Pierre was selling "Mother's Day cards" at the Broadway Junction Station. 3602 Compl. at 4, ¶ 10. He alleges that the cards are "considered to be artistic prints so they're covered under the [F]irst [A]mendment." Id. at 4-5, ¶ 10. After about two hours of selling the cards, Officer Babb approached Pierre and told him to "shut down" because he "wasn't allowed to sell [the cards] there." Id. at 5, ¶ 11. Pierre told her that he was a veteran and was allowed to sell his cards. Id. at 5, ¶ 12. Babb stated that Pierre needed a license to sell

[2] The referenced "document" is presumably the same document from the New York City Department of Consumer Affairs that is attached to the complaint. See Dep't of Consumer Affairs General Vendor License Sheet (annexed to 3603 Compl.) ("DCA Sheet").

the cards, and Pierre showed her a "Hawker's License," which Officer Babb stated "wasn't valid." Id. Babb told Pierre that he "had to leave or she would arrest [him]." Id. Pierre told Babb that he "wasn't leaving," and she "proceeded to aggressively . . . bring [him] to the precinct." Id. at 5, ¶ 13. He was held at the precinct until "2315" and was given a desk appearance ticket before being released. Id. at 5, ¶ 14.

6. Allegations Common to All Complaints

Pierre repeats certain general allegations in all four of his complaints. He was arrested and detained "without just or probable cause." See 0100 Compl. at 8, ¶ 2; 3602 Compl. at 8, ¶ 2; 9462 Compl. at 8, ¶ 2; 3603 Compl. at 8, ¶ 2. The City of New York, "as a matter of policy and practice" has "with deliberate indifference failed to properly sanction or discipline officers including the defendants in this case" for violating the "constitutional rights of citizens." See 0100 Compl. at 6-7, ¶ 22; 3602 Compl. at 7, ¶ 21; 9462 Compl. at 6, ¶ 21; 3603 Compl. at 6, ¶ 14. His rights to be "secure in . . . person and property" and "to be free from excessive use of force and from malicious prosecution, abuse of process, and the right to due process" have been violated. See 0100 Compl. at 7, ¶ 24; 3602 Compl. at 7, ¶ 22; 9462 Compl. at 6-7, ¶ 23; 3603 Compl. at 6, ¶ 15. As a result of the officers' actions, Pierre has "suffered and continue[s] to suffer injuries, including but not limited to emotional distress, loss of income, nightmares, panic attacks, mental anguish and unwarranted severe anger bouts some or all of which may be permanent." See 0100 Compl. at 6, ¶ 17; 3602 Compl. at 5-6, ¶ 15; 9462 Compl. at 5, ¶ 16; 3603 Compl. at 5, ¶ 8. He has "lived in terror of [the defendants'] attack, and continue[s] to suffer various emotional attacks . . . [and has] been unable to function normally which has caused a severe strain and breakdown in [his] personal relationships, in and outside of [his] home." See 0100 Compl. at 6, ¶ 19; 3602 Compl. at 6, ¶ 17; 9462 Compl. at 5-6, ¶ 18; 3603

Compl. at 5, ¶ 10.

B. Procedural History

Pierre's four complaints have been consolidated for pre-trial purposes. See Order, dated July 30, 2013 (Docket # 16 in 13 Civ. 100.). The City of New York has moved to dismiss all the complaints, to which Pierre has filed affirmations in response.[3]

II. LEGAL STANDARD GOVERNING A MOTION TO DISMISS

A party may move to dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) where the opposing party's pleading "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). While a court must accept as true all of the allegations contained in a complaint, that principle does not apply to legal conclusions. See Ashcroft v.

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[3] See Notice of Consolidated Motion to Dismiss the Complaints, filed Aug. 28, 2013 (Docket # 22); Defendant City's Memorandum of Law in Support of its Motion to Dismiss the Consolidated Complaints, filed Aug. 28, 2013 (Docket # 24) ("Def. Mem."); Declaration of Allison G. Moe in Support of Defendant City's Consolidated Motion to Dismiss, filed Aug. 28, 2013 (Docket # 23) ("Moe Decl."); Affirmation in Opposition to Defendant City's Motion to Dismiss Complaint, filed Sept. 24, 2013 (Docket # 25); Affirmation in Opposition to Defendant City's Motion to Dismiss Complaint, filed Sept. 24, 2013 (Docket # 22 in 13 Civ. 3602); Affirmation in Opposition to Defendant City's Motion to Dismiss Complaint, filed Sept. 24, 2013 (Docket # 22 in 13 Civ. 3603); Defendant City's Memorandum of Law in Further Support of its Motion to Dismiss the Consolidated Complaints Pursuant to Fed. R. Civ. P. 12(b)(6), filed Oct. 22, 2013 (Docket # 26). (All references to docket entries here and elsewhere in this Report and Recommendation refer to docket entries in 12 Civ. 9462 unless otherwise stated.)

Pierre's response to the City's motion in Case No. 13 Civ. 100 consisted of a document entitled "Notice Persuant [sic] to Local Civil Rule 12.1 of Conversion of Motion to Dismiss Complaint to Motion for Summary Judgment." See Pierre's Local Civil Rule 12.1 Notice, dated Sept. 11, 2013 (Docket # 19). This document was apparently sent in response to the City's notice pursuant to Local Civil Rule 12.1. See Notice Pursuant to Local Civil Rule 12.1 to Pro Se Litigant Opposing a Rule 12 Motion, dated Aug. 28, 2013. It is unclear what Pierre seeks by filing his own "notice." It appears, however, that he submitted this document in lieu of an opposition to the City's motion to dismiss the 0100 Complaint. In any event, the Court has not considered any matters outside the pleadings proffered by the City, as it is not necessary to do so in order to resolve the motion to dismiss.

Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (citation, internal quotation marks, and brackets omitted). In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," Iqbal, 556 U.S. at 678, and thus a court's first task is to disregard any conclusory statements in a complaint, id. at 679.

Next, a court must determine if a complaint contains "sufficient factual matter" which, if accepted as true, states a claim that is "plausible on its face." Id. at 678 (citation and internal quotation marks omitted); accord Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d Cir. 2007) ("[A] complaint must allege facts that are not merely consistent with the conclusion that the defendant violated the law, but which actively and plausibly suggest that conclusion."). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678 (citations and internal quotation marks omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," a complaint is insufficient under Fed. R. Civ. P. 8(a) because it has merely "alleged" but not "'show[n]'—'that the pleader is entitled to relief.'" Id. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

In the case of pro se plaintiffs, "[a] document filed pro se is to be liberally construed . . . and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson, 551 U.S. at 94 (internal citations and quotation

marks omitted); accord McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (a pro se party's pleadings should be construed liberally and interpreted "'to raise the strongest arguments that they suggest'") (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)). However, even pro se pleadings must contain factual allegations that "'raise a right to relief above the speculative level.'" Dawkins v. Gonyea, 646 F. Supp. 2d 594, 603 (S.D.N.Y. 2009) (quoting Twombly, 550 U.S. at 555).

III. DISCUSSION

Because the individual officers have either not answered or have not been served, the City's motion does not seek dismissal of the complaints to the extent that claims are asserted against the individual police officers named therein. See Def. Mem. at 2-3, n.1. Nonetheless, the City's papers make substantive arguments as to why the officers' actions did not violate Pierre's constitutional rights. Id. at 9-19. As explained below, the Court agrees with the City's arguments that the complaints do not show a constitutional violation by any of the individual officers. This means that the City cannot be held liable under 42 U.S.C. § 1983 and thus must be dismissed as a defendant. In addition, the complaints should be dismissed as to all individual defendants because in a case such as this where the plaintiff is proceeding in forma pauperis, "the court shall dismiss the case at any time if the court determines that . . . the action . . . fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). It does not matter that the City's motion papers do not seek dismissal on behalf of the individual defendants because notice is not required for a dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii). See Blanton v. City of New York, 2012 WL 6634177, at *1 (S.D.N.Y. Dec. 20, 2012), adopted by 2013 WL 3783734 (S.D.N.Y. July 9, 2013). In any event, "plaintiff has been put on notice of the potential for dismissal . . . by . . . this Report and Recommendation." Id. (citing Magouirk v. Phillips, 144

F.3d 348, 359 (5th Cir. 1998) (report and recommendation sufficient to satisfy notice requirement for sua sponte dismissal)). Accordingly, we have considered the viability of the complaints as to all defendants and find that they should be dismissed as to both the City and the individual defendants.

A. 42 U.S.C. § 1983 Claims

To state a claim under section 1983, Pierre must show that he was denied a constitutional or federal statutory right and that the deprivation of that right occurred under color of state law. See 42 U.S.C. § 1983; West v. Atkins, 487 U.S. 42, 48 (1988). Section 1983 does not itself create any substantive rights but rather "provides only a procedure for redress for the deprivation of rights established elsewhere." Sykes v. James, 13 F.3d 515, 519 (2d Cir. 1993) (citation omitted).

To the extent Pierre relies on 42 U.S.C. § 1983, we construe the complaints as making claims that Pierre was (a) falsely arrested; (b) subjected to excessive force during his arrests; (c) deprived of his property without due process of law; and (d) was arrested in violation of the First Amendment.

1. False Arrest Claims

A section 1983 false arrest claim "derives from [the] Fourth Amendment right to remain free from unreasonable seizures, which includes the right to remain free from arrest absent probable cause." Jaegly v. Couch, 439 F.3d 149, 151 (2d Cir. 2006) (citation omitted). The Second Circuit has held that such a claim is "substantially the same as a claim for false arrest under New York law." Covington v. City of New York, 171 F.3d 117, 122 (2d Cir. 1999) (quoting Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996)). To state a claim for false arrest under New York law, "a plaintiff must show that '(1) the defendant intended to confine the

plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged.'" Savino v. City of New York, 331 F.3d 63, 75 (2d Cir. 2003) (quoting Bernard v. United States, 25 F.3d 98, 102 (2d Cir.1994)). "The existence of probable cause to arrest constitutes justification and 'is a complete defense to an action for false arrest' . . . whether that action is brought under state law or under § 1983." Weyant, 101 F.3d at 852 (quoting Bernard, 25 F.3d at 102). Probable cause exists when an officer has "knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." Id. The existence of probable cause must be determined based on the totality of the circumstances, see Calamia v. City of New York, 879 F.2d 1025, 1032 (2d Cir. 1989), and evaluated under an "objective standard," United States v. Tramontana, 460 F.2d 464, 467 (2d Cir. 1972); accord United States v. $557,933.89, More or Less, in United States Funds, 287 F.3d 66, 85 (2d Cir. 2002) ("[T]he determination of probable cause is an objective one, to be made without regard to the individual officer's subjective motives or belief as to the existence of probable cause.").

The New York City Administrative Code provides as follows:

> It shall be unlawful for any individual to act as a general vendor without having first obtained a license in accordance with the provisions of this subchapter, except that it shall be lawful for a general vendor who hawks, peddles, sells or offers to sell, at retail, only newspapers, periodicals, books, pamphlets or other similar written matter, but no other items required to be licensed by any other provision of this code, to vend such without obtaining a license therefor.

See N.Y.C. Admin. Code § 20-453. A "general vendor" is defined as "[a] person who hawks, peddles, sells, leases or offers to sell or lease, at retail, goods or services, including newspapers, periodicals, books, pamphlets or other similar written matter in a public space." Id. § 20-452(b).

The Code also provides that "[e]ach general vendor shall carry his or her license on his or her person and it shall be exhibited upon demand to any police officer, authorized officer or employee of the department or other city agency." Id. § 20-461. Additionally, the Code provides that "failure by a general vendor who is required to be licensed . . . to exhibit upon demand a general vendor's license . . . to any police officer . . . shall be presumptive evidence that such general vendor is not duly licensed." Id. § 20–474.3(a). Other provisions in the Code subchapter titled "Consumer Affairs" make clear that the required license is one issued by the City's Department of Consumer Affairs. See, e.g., id. § 20-101 ("The Council finds that . . . licensing by the department of consumer affairs is a necessary and proper mode of regulation with respect to certain trades, businesses and industries."); id. § 20-102 (defining "license" as "an authorization by the department of consumer affairs"); see also N.Y. Skyline, Inc. v. City of New York, 94 A.D.3d 23, 25 (1st Dep't 2012) ("General vendor licenses are administered by the New York City Department of Consumer Affairs (DCA).").

While Pierre's complaints allege that he showed the officers various documents in response to their requests for a license, he does not allege in any of his complaints that he possessed a license from the Department of Consumer Affairs as required by N.Y.C. Admin Code. § 20-453, let alone that he produced such a license when asked to do so by officers as required by section 20-461. Pierre makes references to his having a "Brooklyn Vendor's Certificate License" and a "Hawker's License" on certain dates. See 0100 Compl. at 3, ¶ 2; 3602 Compl. at 5, ¶ 12. But Pierre does not at any point allege that these licenses are in fact the general vendor licenses required by the Administrative Code. Indeed, Pierre attaches to one of the complaints a copy of the document that he calls a "Brooklyn Vendors Certificate License." See License Image (annexed to 0100 Compl.). This document does not reflect that it was issued

by the Department of Consumer Affairs. Instead, it states it is issued by the "County Clerk, Kings County." Id.

Pierre seems to argue that his possession and production of this license was sufficient to negate probable cause to arrest him for failure to comply with the Administrative Code. See Affirmation in Opposition to Defendant City's Motion to Dismiss Complaint in 12 Civ. 9462, at 2, ¶ 2. The strongest argument the Court can discern for Pierre's position is that he is relying upon N.Y. Gen. Bus. Law §§ 32 and 35-a, which grant certain preferences and privileges to honorably discharged veterans who wish to work as general vendors. Case law is clear, however, that any general vendor license issued to a veteran given preference under state law must be issued by the Department of Consumer Affairs. See, e.g., Morris v. N.Y.C. Dep't of Health and Mental Hygiene, 44 Misc. 3d 1209(A), at *1 (Sup. Ct. N.Y. Co. 2013) ("Under Section 35–a, the New York City Department of Consumer Affairs (DCA) issues specialized vending licenses that restrict by location, size of vending area, and number of vendors per area, among others, veterans with service-related disabilities who are general vendors."); People v. Sands, 15 Misc. 3d 459, 460 (N.Y. Crim. Ct. 2007) ("General Business Law § 35–a grants certain privileges to disabled veteran vendors in New York City but also imposes time, place and manner restrictions on those vendors and makes certain local regulations applicable to them."). Thus, we cannot say that an officer seeing this license could not reasonably conclude that Pierre violated the Administrative Code.[4]

[4] The City has proffered the affidavit of Janet Lim, the Assistant General Counsel for the New York City Department of Consumer Affairs, which states that the Department's search of its records indicates that Pierre did not possess a general vendor's license on the dates in question. See Declaration of Janet Lim (annexed as Ex. E to Moe Decl.) ¶¶ 2-3. It is not necessary to consider this declaration, however, inasmuch as Pierre has failed to allege that he had such a license.

Some allegations in Pierre's complaints suggest that he believes that, because he is a veteran, he does not need a license to act as a general vendor. See 0100 Compl. at 3, ¶ 2; 3602 Compl. at 5, ¶ 12. This contention is rejected, however, inasmuch as Pierre does not cite to — nor is the Court is aware of — any law or statute that overrides the applicable Administrative Code provisions. Although New York state law provides that honorably discharged veterans of foreign wars must be permitted by both state and local officials to obtain vendors' licenses, see N.Y. Gen. Bus. Law § 32, it does not waive any applicable local licensing requirements. Thus, Pierre's informing an arresting officer of his military service could not have rendered any arrest based on lack of compliance with the Administrative Code unlawful.

Pierre suggests in his opposition papers that N.Y.C. Admin. Code § 20-453 "clearly states a license isn't required for vendors who sell newspapers, periodicals, books, pamphlets or other written matter" and that his Valentine's Day and Mother's Day cards "fall under this category."[5] Pierre is mistaken, however, because this exemption in the Code does not exempt any "written matter" but only written matter that is "similar" to the other items listed in the provision: that is, similar to "newspapers, periodicals, books, [and] pamphlets." N.Y.C. Admin. Code § 20-453. As one court noted in ruling that calendars and datebooks were not exempted from section 20-453, "[t]he common characteristic of 'newspapers', 'periodicals', 'books' and 'pamphlets', which are set forth in the statute as exempt, is the ability to communicate in a manner that contributes to or generates the exchange of ideas that trigger constitutional protection and are fundamental to a democratic society." People v. Shapiro, 139 Misc. 2d 344,

[5] See Affirmation in Opposition to Defendant City's Motion to Dismiss Complaint in 13 Civ. 3602, at 7, ¶ 2.G; Affirmation in Opposition to Defendant City's Motion to Dismiss Complaint in 13 Civ. 3603, at 7, ¶ 3.G.

346-47 (N.Y. Crim. Ct. 1988). Accordingly, "[p]apers that are clothed between two covers with a spine to bind them together, and happen to have some words included should not be categorized in the same vein as a political pamphlet, a newspaper, or even a poem, which is sold in the free-flowing exchange of ideas in this society." Id. at 348. Similarly, People v. Andujar, 31 Misc. 3d 757 (N.Y. Crim. Ct. 2011), reasoned that "the term 'other similar written matter' must mean similar insofar as it is a vehicle for speech and expression akin to a newspaper, periodical, book or pamphlet." Id. at 763. Thus, Pierre's claim for false arrest based upon the argument that greeting cards are exempt from the general vendor's license requirement must fail because the complaints do not describe the greeting cards in such a way as to suggest that they come within the "other similar written matter" exemption of N.Y.C. Admin. Code § 20-453.

Finally, Pierre attaches a document to the 3603 Complaint titled "General Vendor License: License Application Checklist," which appears to be issued by the New York City Department of Consumer Affairs. See DCA Sheet (annexed to 3603 Compl.). The document states: "You do NOT need a General Vendor license if . . . [y]ou sell artwork, including paintings, photographs, prints, and sculptures." Id. But this document suggests an exemption only for "paintings, photographs, prints and/or sculpture" and, based on the description of the cards provided in the complaint, would not negate a police officer's reasonable belief that sale of the greeting cards still required a general vendor's license.

2. Excessive Force Claims

Pierre alleges in some of his complaints that force was used in effectuating his arrest. See 0100 Compl. at 5, ¶ 9 (alleging that officers "proceeded to handcuff [him] in a manner which left indentations on [his] wrist"); id. at 7, ¶ 24 (referring to his right "to be free from excessive use of force"); id. at 8, ¶ 2 (alleging that he was detained and imprisoned with

"excessive force" and was "assault[ed]"); 3602 Compl. at 4, ¶ 8 (alleging that officers "assault[ed] him"); id. at 5, ¶ 13 ("[Officer Babb] proceeded to aggressively . . . bring me to the precinct."); id. at 8, ¶ 2 (alleging that officers "us[ed] excessive force [] and assault[ed]" him); 9462 Compl. at 4, ¶ 9 (alleging that "officers proceeded to handcuff [him] in a manner which left indentations on [his] wrists"); id. at 8, ¶ 2 (alleging that officers "us[ed] excessive force [] and assault[ed]" him). We construe these allegations as making claims of excessive force under the Fourth Amendment.

"The Fourth Amendment prohibits the use of unreasonable and therefore excessive force by a police officer in the course of effecting an arrest." Tracy v. Freshwater, 623 F.3d 90, 96 (2d Cir. 2010). "[C]laims of excessive force are to be judged under the Fourth Amendment's 'objective reasonableness' standard." Brosseau v. Haugen, 543 U.S. 194, 197 (2004) (quoting Graham v. Connor, 490 U.S. 386, 388 (1989)). "[T]he factfinder must determine whether, in light of the totality of the circumstances faced by the arresting officer, the amount of force used was objectively reasonable at the time." Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 123 (2d Cir. 2004). "Excessive force claims require 'serious or harmful' — not 'de minimis' — use of force." Biswas v. City of New York, 2013 WL 5421678, at *18 (S.D.N.Y. Sept. 30, 2012) (quoting Drummond v. Castro, 522 F. Supp. 2d 667, 678–79 (S.D.N.Y. 2007) (internal quotation marks and citations omitted)). Case law has held that in assessing a claim for excessive force based on handcuffing, a court "should consider evidence that: '1) the handcuffs were unreasonably tight; 2) the defendants ignored the arrestee's pleas that the handcuffs were too tight; and 3) the degree of injury to the wrists.'" Id. (quoting Matthews v. City of New York, 889 F. Supp. 2d 418, 441–42 (E.D.N.Y. 2012)).

Pierre does not make allegations showing that arresting officers used any significant force whatsoever. His assertions of being arrested "with excessive force" or in an "aggressive" manner are mere "labels and conclusions," and thus cannot overcome a motion to dismiss. See Twombly, 550 U.S. at 555. With respect to Pierre's more specific allegations that handcuffs were used in a manner that left "indentations" on his wrists, "[t]here is a consensus among courts in this circuit that tight handcuffing does not constitute excessive force unless it causes some injury beyond temporary discomfort." Usavage v. Port Auth. of New York and New Jersey, 932 F. Supp. 2d 575, 592 (S.D.N.Y. 2013) (citations omitted); see also Gonzalez v. City of New York, 2000 WL 516682, at *4 (E.D.N.Y. Mar. 7, 2000) ("[I]f the application of handcuffs was merely uncomfortable or caused pain, that is generally insufficient to constitute excessive force."). Thus, the allegation that handcuffs left "indentations" on Pierre's wrists, see 0100 Compl. at 5, ¶ 9; 9462 Compl. at 4, ¶ 9, does not reflect a use of force that is prohibited by the Fourth Amendment.

3. Deprivation of Property Claim

One of Pierre's complaints alleges that officers "took [Pierre's] goods and left" and that they "confiscate[d] [his] property unlawfully and illegally." See 3603 Compl. at 4-5, ¶¶ 4, 6. Another one of his complaints alleges that police "confiscated all of [Pierre's] supplies," and didn't give him a "voucher" or return any of this property to Pierre. See 0100 Compl. at 5, ¶ 14. Construing these allegations to assert claims under the Fourteenth Amendment for deprivation of property without due process of law, the claims are rejected. "[I]ntentional deprivations do not violate [the Due Process Clause] provided . . . that adequate state post-deprivation remedies are available." Hudson v. Palmer, 468 U.S. 517, 533 (1984). Thus, a claim for deprivation of

property "cannot be brought in federal court if the relevant state court provides an adequate remedy for the deprivation of [the property at issue]." Key v. Tanoury, 2006 WL 3208548, at *2 (S.D.N.Y. Nov. 3, 2006) (citations omitted).

The Second Circuit has held that "an adequate post-deprivation remedy is a defense to a Section 1983 due process claim only where the deprivation is random and unauthorized," but not "where the deprivation complained of results from the operation of established state procedures." Butler v. Castro, 896 F.2d 698, 700 (2d Cir. 1990); accord Dove v. City of New York, 2000 WL 342682, at *3 (S.D.N.Y. Mar. 30, 2000) ("Deprivation of property by a state actor, whether intentional or negligent, does not give rise to a claim under § 1983 so long as the law of that state provides for an adequate post-deprivation remedy and the deprivation was the result of a random and unauthorized act.") (citations and internal quotation marks omitted). Here, there are no factual allegations suggesting that there is any infirmity in the established procedures used by the City of New York in seizing property from unlicensed vendors at the time of their arrests. Accordingly, the only remaining question is whether New York has provided an adequate post-deprivation remedy.

"Where loss of property was 'random and unauthorized,' courts have found that 'New York provides an adequate post-deprivation remedy in the form of state law causes of action for negligence, replevin, or conversion . . . . '" Cantave v. New York City Police Officers, 2011 WL 1239895, at *7 (E.D.N.Y. Mar. 28, 2011) (quoting Dove, 2000 WL 342682, at *3). Because Pierre has access to these remedies, he cannot state a claim for deprivation of property pursuant to 42 U.S.C. § 1983, and this claim should be dismissed.

4. First Amendment Claim

To the extent Pierre suggests that any of his arrests violated the First Amendment, any such claim must fail as the greeting cards Pierre was selling are not described in the complaint in such a way as to suggest that they have "predominantly expressive" purposes. See Mastrovincenzo v. City of New York, 435 F.3d 78, 90-102 (2d Cir. 2006). And even if they had been so described, New York City's licensing scheme for street vendors has been held to satisfy the First Amendment. See id.

B. Claims Against the City of New York

Municipalities may be treated as "persons" for the purpose of section 1983 claims "where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the municipality's] officers." Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978). A municipality may not be held liable under section 1983, however, on the basis of respondeat superior. Id. at 694–95; accord Roe v. City of Waterbury, 542 F.3d 31, 36 (2d Cir. 2008). "Rather, a plaintiff must establish both a violation of his or her constitutional rights and that the violation was caused by a municipal policy or custom; that is, that the policy or custom was the actual 'moving force' behind the alleged wrongs." Jouthe v. City of New York, 2009 WL 701110, at *7 (E.D.N.Y. Mar. 10, 2009) (citing Monell, 436 U.S. at 694–95; Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 403–04 (1997)). As concluded above, Pierre has not stated a claim for violation of his constitutional rights. A fortiori, his Monell claims against the City of New York must fail. See, e.g., City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) ("[None] of our cases authorize[ ] the award of damages against a municipal corporation based

on the actions of one of its officers . . . [i]f a person has suffered no constitutional injury . . . . "); Segal v. City of New York., 459 F.3d 207, 219 (2d Cir. 2006) (where "district court properly found no underlying constitutional violation," it was not necessary to consider claims of municipal liability under Monell); Levy v. Alfano, 47 F. Supp. 2d 488, 498 (S.D.N.Y. 1999) ("It is well settled that a municipality may not be held liable where there is no underlying constitutional violation by a municipal official.") (citation omitted).[6]

C. State Law Claims

In each complaint, Pierre asserts that he is also making state law claims. Federal courts have "supplemental jurisdiction" over state law claims if they are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III." 28 U.S.C. § 1367(a). Nonetheless, a district court may decline to exercise supplemental jurisdiction when it "has dismissed all claims over which it has original jurisdiction." Id. § 1367(c)(3); accord United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (state claims "should be dismissed" if federal claims are dismissed before trial); In re Merrill Lynch Ltd. P'ships Litig., 154 F.3d 56, 61 (2d Cir. 1998); Lennon v. Miller, 66 F.3d 416, 426 (2d Cir. 1995). Here, Pierre's section 1983 claims provided the only basis for federal jurisdiction. Thus, the Court should decline to exercise supplemental jurisdiction over Pierre's state law claims.

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[6] While there are limited exceptions to this rule, none apply here. See Barrett v. Orange Cnty. Human Rights Comm'n, 194 F.3d 341, 350 (2d Cir.1999) (Monell liability possible where "the injuries complained of are not solely attributable to the actions of named individual defendants"); Curley v. Vill. of Suffern, 268 F.3d 65, 71 (2d Cir. 2001) (suit may proceed against municipality where individual defendants are dismissed on qualified immunity grounds).

IV. CONCLUSION

For the foregoing reasons, the City of New York's motion to dismiss the consolidated complaints (Docket # 22 in 12 Civ. 9462) should be granted. Additionally, Pierre's complaints as asserted against all the remaining defendants – consisting of individual police officers – should be dismissed for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). Pierre should be given leave to file an amended complaint in the event he is able to correct the deficiencies by pleading facts that would state a claim against any of these defendants. See Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir.1991) ("It is the usual practice upon granting a motion to dismiss to allow leave to replead.") (citations omitted).

PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days including weekends and holidays from service of this Report and Recommendation to serve and file any objections. See also Fed. R. Civ. P. 6(a), (b), (d). Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with copies sent to the Hon. Lewis Kaplan, and to the undersigned, at 500 Pearl Street, New York, New York 10007. Any request for an extension of time to file objections must be directed to Judge Kaplan. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report and Recommendation on appeal. See Thomas v. Arn, 474 U.S. 140 (1985); Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., 596 F.3d 84, 92 (2d Cir. 2010).

Dated: January 7, 2014

New York, New York

GABRIEL W. GORENSTEIN
United States Magistrate Judge

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