

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ANGEL ALVAREZ,

Plaintiff,

-v-

THE CITY OF NEW YORK, P.O. MICHAEL  
TEDESCHI, THOMAS COZART, P.O.  
DOUGLAS BRIGHTMAN, SGT. PAUL  
KERRIGAN, and SGT. PHILIP TERPOS,

Defendants.

11-CV-5464 (JPO)

OPINION AND ORDER

J. PAUL OETKEN, District Judge:

This case was tried before a jury, and on September 28, 2016, the jury rendered a verdict in favor of Plaintiff Angel Alvarez, finding that three of the five individual Defendants had violated his federal civil rights by using excessive force. The jury awarded \$1 in nominal damages. (Dkt. No. 155.) Before the Court now are Plaintiff's motion for a new trial as to damages or for an award of attorneys' fees and costs (Dkt. No. 173), and Defendants' motion for judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 50, in which they also seek post-offer costs (Dkt. No. 182). For the reasons that follow, both motions are granted in part and denied in part.

**I. Background**

Familiarity with the background of this case is presumed. The Court therefore summarizes only the facts and proceedings at trial as relevant to the present motions.

Plaintiff Angel Alvarez sued Defendants the City of New York, Police Officer Douglas Brightman, Police Officer Thomas Cozart, Sergeant Paul Kerrigan, Police Officer Michael Tedeschi, and Sergeant Philip Terpos, claiming that they violated his civil rights under 42 U.S.C.

§ 1983 and under New York law. Alvarez alleged that he was subjected to excessive force in August of 2010, when Defendants Cozart, Kerrigan, Tedeschi, and Brightman discharged their firearms, striking him over twenty times, and when Brightman kicked him in the head and Terpos forcibly handcuffed him, in connection with an altercation between Alvarez and non-party Luis Soto. Alvarez claimed that he has experienced pain and suffering as a result of Defendants' actions. (Dkt. No. 1.)

The case was tried before a jury, which returned a verdict in favor of Alvarez on his claims that Defendants Cozart, Kerrigan, and Tedeschi used excessive force, and in favor of Defendants Brightman and Terpos. (Dkt. No. 155.) The jury awarded Alvarez \$1.00 in nominal damages, and declined to award compensatory or punitive damages. (*Id.*) The jury also answered a series of special interrogatories (Dkt. No. 156):

**Question 1:**

Do you find by a preponderance of the evidence that plaintiff had control of a firearm at any point during the incident?

YES \_\_\_ NO X

**Question 2:**

Do you find by a preponderance of the evidence that any of the defendants believed reasonably, even if mistakenly, that plaintiff had control of a firearm and posed a significant threat of death or serious physical injury at any point during the incident?

YES X NO \_\_\_

If yes, which defendants:

a. Thomas M. Cozart	YES <u>X</u>	NO ___
b. Paul Kerrigan	YES <u>X</u>	NO ___
c. Michael T. Tedeschi	YES <u>X</u>	NO ___

**Question 3:**

Do you find by a preponderance of the evidence that any of the defendants continued to shoot at plaintiff after it was no longer reasonable to believe that plaintiff posed a significant threat of death or serious physical injury?

YES  X  NO \_\_\_

If yes, which defendants:

a. Thomas M. Cozart	YES	<u> X </u>	NO	___
b. Paul Kerrigan	YES	<u> X </u>	NO	___
c. Michael T. Tedeschi	YES	<u> X </u>	NO	___

Currently before the Court are post-trial motions filed by the parties. Alvarez argues that the jury verdict was unreasonable and that, as a result, a new trial as to damages should be ordered. (Dkt. No. 174 at 1.) In the alternative, Alvarez seeks an award of attorneys' fees and costs. (*Id.*) Defendants—in addition to opposing Alvarez's requests—seek judgment as a matter of law that there was not sufficient evidence to sustain an excessive force claim. (Dkt. No. 183 at 5.) They also argue that Cozart, Kerrigan, and Tedeschi are entitled to qualified immunity. (*Id.* at 12.) Finally, Defendants seek costs incurred after their unaccepted Rule 68 offer of judgment was made. (*Id.* at 21.)

**II. Discussion**

The Court first addresses Alvarez's request for a new trial. It then addresses Defendants' motion for judgment as a matter of law and the issue of qualified immunity. Finally, it addresses Alvarez's request for attorneys' fees and costs and Defendants' request for post-Rule 68 offer costs.

**A. Motion for a New Trial**

Alvarez first seeks a new trial in part on the issue of damages, pursuant to Federal Rule of Civil Procedure 59(a). (Dkt. No. 174 at 9.)

“A motion for a new trial ordinarily should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.” *Atkins v. N.Y. City*, 143 F.3d 100, 102 (2d Cir. 1998) (quoting *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 911 (2d Cir. 1997)). In considering a motion for a new trial, the Court “need not view the evidence in the light most favorable to the verdict winner.” *Raedle v. Credit Agricole Indosuez*, 670 F.3d 411, 418 (2d Cir. 2011). However, “a judge ‘should rarely disturb a jury’s evaluation of a witness’s credibility.’” *Id.* (quoting *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134 (2d Cir. 1998)). Specifically, as regards the award of nominal damages in an excessive force case, where “the jurors were entitled to resolve the conflicting testimony in a way that permitted them to find that excessive force, though used, did not result in compensable injuries, the award of only nominal damages will not be disturbed.” *Haywood v. Koehler*, 78 F.3d 101, 105 (2d Cir. 1996).

Alvarez argues that the jury’s “decision to award only nominal damages was simply unjustifiable,” and that, “as a matter of law, a person who suffers a bullet wound from excessive force has suffered a compensatory injury worth more than one dollar.” (Dkt. No. 174 at 11.) Alvarez, however, cites to no precedent supporting this specific position.

Indeed, the Second Circuit has held that “a finding of excessive force does not, as a matter of law, entitle the victim to an award of compensatory damages.” *Haywood*, 78 F.3d at 104. The Second Circuit’s decision in *Gibeau v. Nellis*, 18 F.3d 107 (2d Cir. 1994), is instructive. There, the Second Circuit upheld a district court’s refusal to set aside a jury verdict granting an excessive-force plaintiff no compensatory damages. The Second Circuit acknowledged a variety of possible theories that could support a verdict of excessive force and no compensatory damages, among them, that “[i]t is possible that the jury considered only the last blow to be excessive, and it may have concluded that the [injury] was caused by the first

blow.” *Id.* at 110. The Second Circuit concluded that “[t]he record reveals that [plaintiff] never conclusively established that [defendant]’s use of excessive force caused him pain, suffering, humiliation, or fear.” *Id.*

So too here. The special interrogatories confirm that the jury found that there was both unjustified *and* justified force used against Alvarez. (Dkt. No. 156.) It is possible, based on this finding, that the jury reasonably concluded that Alvarez’s pain and suffering—Alvarez did not seek damages for economic loss (Dkt. No. 174 at 13)—resulted only from the *justified* use of force. Indeed, the Court instructed the jury on precisely this possibility, an instruction to which Alvarez’s counsel did not object. (Dkt. No. 169 at 1064:17-20 (“You may also award nominal damages if you find that both justified and unjustified force were used, and that the plaintiff suffered injuries that resulted only from the justified use of force.”).) Given the volume of gunshot wounds inflicted on Alvarez, it would not be seriously erroneous for the jury to conclude that Alvarez’s pain and suffering resulted from earlier, justified rounds of bullets that struck him, rather than later, unjustified rounds. This is especially so given conflicting testimony about the manner in which Alvarez sustained the gunshot wounds and the resultant need for credibility determinations by the jury, determinations this Court is loath to question.

Alternatively, the jury could have reasonably concluded that Alvarez failed to support his claims of injury such that any compensatory damages award would have been purely speculative. “When a jury ‘is unable to compute the monetary damages except by engaging in pure speculation and guessing,’ an award of nominal damages is appropriate.” *Hyppolite v. Collins*, No. 11 Civ. 588, 2015 WL 2179772, at \*4 (D. Conn. May 8, 2015) (quoting *Adedeji v. Hoder*, 935 F. Supp. 2d 557, 574 (E.D.N.Y. 2013)). Accordingly, the Court here instructed the jury: “You may also award nominal damages if . . . you find that you’re unable to compute monetary damages, except by engaging in pure speculation and guessing.” (Dkt. No. 169 at 1064:20-24.)

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.