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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

FIRST FEDERAL SAVINGS & LOAN OF MATTOON, ILLINOIS, as Administrator of the Estate of Michael J. Brandel, deceased,	)	
Plaintiff,	)	
v.	)	Case No. 12-CV-2050
VERMILION COUNTY DEPUTY DOUG MILLER, et al.,	)	
Defendants.	)	

ORDER

The plaintiff commenced this case against Vermilion County, Illinois, the Vermilion County Sheriff, the Vermilion County's Sheriff's Department, and Vermilion County Sheriff's Deputies Doug Miller, Thomas Cruppenink, and Peter Miller.[1] The plaintiff asserts its claims as administrator of the estate of the decedent, Michael Brandel, who was shot and killed by Cruppenink on the evening of November 27, 2010.

The defendants have filed a motion for summary judgment. For the following reasons, the motion [61] is denied.

BACKGROUND[2]

At all relevant times, landlord Douglas Macklin owned some apartments at the corner of Georgetown Road and Maplewood Avenue, just south of Danville, in Vermilion County, Illinois.[3] On the evening of November 27, 2010, Macklin received a phone call from a tenant who went to the rental office at Georgetown and Maplewood to drop off a rent check. The tenant noticed that items were strewn about the driveway area. The tenant exited his van and walked to the office's mail slot when he heard a man addressing him in an angry, hostile manner; the man was standing in the doorway of the apartment adjacent to the rental office. The tenant

[1]Two defendants have the same last name. To avoid confusion, the court refers to them as Deputy Doug and Deputy Peter.

[2] The background section is taken primarily from the defendants' documents and is not a statement of undisputed fact.

[3] Georgetown Road, also known as Route 1 and Route 150, is a heavily traveled roadway.

did not know the man so he ignored him and walked back to his van. The man in the doorway threw something at the van and hit the windshield, but the vehicle was apparently not damaged.

The tenant returned home and called Macklin to report what had happened. The tenant also said that it seemed that the man might be damaging the apartment. Macklin drove to the apartment to talk to the man in the apartment adjacent to the rental office. The man was Michael J. Brandel.

As Macklin pulled into the driveway, he noticed the debris in the driveway. He also noticed that the glass in the side door of Brandel's apartment appeared cracked or "spidered" as if it had been shot from inside the apartment. Macklin heard voices and sounds suggesting that Brandel was damaging the apartment. He knocked on the door and Brandel answered. Macklin asked Brandel what was going on, and Brandel responded, "Nothing." Macklin said, "Something is going on." But Brandel responded angrily, "Nothing's going on," and shut the door. Macklin characterized Brandel as hostile, distant, and irrational. It was uncharacteristic of Brandel; Macklin knew him to be friendly and passive. Macklin went into the adjacent rental office and could hear through the wall that things were being thrown around Brandel's apartment. He also heard Brandel talking angrily, but didn't hear anyone else talking.

Macklin called 911 to report that he thought Brandel had "gone off the deep end," was belligerent, was destroying his apartment, and was throwing items outside. Macklin said he was worried that Brandel was "gonna to do something pretty bad." Deputy Peter responded to the call, as did police officer Joseph McDonald from nearby Belgium, Illinois. The officers talked to Macklin, went to the door, knocked, and identified themselves as police officers. They asked Brandel to open the door and talk to them, but he cursed at them and told them to go away. They also could hear what sounded like things being thrown against the walls, and Brandel talking angrily. After a short time, they walked to the side of the house to talk to Macklin again. Deputy Peter then called his command supervisor. Because no crime was permitted in his presence and it seemed the only issue was damage to rental property, Deputy Peter informed Macklin that the situation was not a criminal matter.

As Deputy Peter and Officer McDonald prepared to leave, they heard a loud crash coming from the front of the apartment. When they went to investigate, they noticed that a large plate glass window was broken, and items had been thrown out the window. Macklin says that the window glass was pretty thick; he concluded that whatever was thrown at the window must have been large. The officers went to the front porch. Deputy Peter looked through the gaping hole in the window and saw Brandel sitting in a chair. Deputy Peter ordered Brandel to freeze and put his hands up; Brandel did not comply. Deputy Peter drew his Taser and pointed it at Brandel through the hole in the window and warned him that he must comply. Deputy Peter states that as he stood in front of the window, Brandel threw something at him through hole in the window. Deputy Peter and Officer McDonald say that Deputy Peter had to step back or lean back to dodge whatever was thrown at him. (Macklin does not recall seeing anything thrown at Deputy Peter, or that he dodged anything.) Deputy Peter viewed Brandel's act of throwing the item as an aggravated assault on a police officer. Brandel refused to comply with Deputy Peter's orders and got up from the chair. Deputy Peter fired his Taser at Brandel through the open window – the first of multiple attempts by officers that evening to tase Brandel into

submission. Brandel tried to pull out the Taser barbs. Deputy Peter told Officer McDonald to try to kick in the door, and called for backup.

Macklin told the officers that they would not be able to kick in the front door, but they might have better luck at the side door, for which Macklin might even have the key. But when Macklin located and tried the key, he found that the lock had been changed. Then, Deputy Doug arrived, and the deputies kicked in the side door and entered the apartment. Officer McDonald stayed outside to make sure that Brandel did not escape. The two deputies observed that items were strewn about the apartment and the walls had been damaged. They began to "clear" the apartment and attempted to locate Brandel; they were soon joined by Deputy Cruppenink, who entered the apartment and assisted the other deputies in securing the premises. One officer had his Taser drawn; another had his firearm drawn. The deputies repeatedly identified themselves as "Sheriff's Department."

The deputies soon found a closed door and attempted to open it, but someone behind the door prevented them from opening the door fully. They had located Brandel in a small bathroom (approximately 5' by 7'). The deputies attempted to get Brandel to come out of the bathroom. Brandel did not comply. With each attempt of the deputies to open the door, Brandel forced it closed again. Finally the deputies decided to kick in the bathroom door. The door came off the hinges and fell into the bathroom toward Brandel. A splintered piece of woodwork fell off the wall into the bathroom.

All three deputies were in the narrow hall outside the bathroom door, with Deputy Cruppenink in the middle, in front of the bathroom doorway. The deputies pushed the door away from Brandel, who rose to his feet and began to swing at the deputies. They attempted to subdue him with Tasers, which had little effect; again, he just removed the barbs. Cruppenink stepped into the bathroom to try to grab Brandel, and also struck Brandel in the forehead with his flashlight, to no effect. According to the deputies, Brandel continued to resist.

The broken woodwork lay on the bathroom floor. It was four or five feet long, and had a jagged diagonal at one end. The officers say that Brandel picked up the woodwork and began to swing it around and hold it like a spear. One deputy attempted to "drive-stun" Brandel with his Taser, but Brandel knocked his hand away; Cruppenink observed that Brandel used the piece of wood to do so. Brandel was a large man, and he could easily cover the distance between himself and Cruppenink by jabbing the sharp end of the woodwork toward Cruppenink. Cruppenink took a step back and removed his gun, pointed it at Brandel, and warned him several times to drop the woodwork or he would shoot. Brandel started to close the distance on Cruppenink with the wooden piece in his hand. Cruppenink fired three shots at Brandel. One bullet grazed Brandel's hands. Another bullet hit his arm, exited, and entered his abdomen. A third bullet entered his upper thigh. The order in which Brandel sustained his wounds is not known.

Brandel dropped the wood and turned around. He stepped into the tub, which was the only place left to retreat. The officers called for an ambulance. Deputy Peter went to Brandel, told him to stay still, and attempted to handcuff him. He told Brandel that an ambulance was on the way. Brandel, who was sitting in the tub by that time, struggled against the handcuffs, and Deputy Peter could not handcuff more than one hand behind Brandel's back. He then

handcuffed Brandel in the front and kept him quiet. Paramedics arrived but could not save Brandel, who died in the apartment at 7:38 p.m.

It was later learned that Brandel had a history of bipolar disorder. Friends and family reported that he had been acting strangely for several days and was upset after a recent visit to Reno, Nevada to see his grandfather, who was ill.

ANALYSIS

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Any discrepancies in the factual record should be evaluated in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (*citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). The party moving for summary judgment must show the lack of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In order to be a "genuine" issue, there must be more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248.

"Summary judgment is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events." *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2000). "If a party . . . fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it." Fed. R. Civ. P. 56(e).

The defendants argue that they are entitled to summary judgment because (1) the deputies' entry into Brandel's apartment was lawful; (2) Cruppenink's use of deadly force was reasonable; and (3) the deputies are entitled to qualified immunity. The court addresses each argument in turn.

The deputies' entry into Brandel's apartment

The defendants argue that the deputies could enter Brandel's apartment without a warrant because they had probable cause to arrest Brandel "for various crimes," and exigent circumstances existed.

"The 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. It is a "'basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.'" *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980). When police have probable cause to believe that a crime is in progress, exigent circumstances exist and a warrantless entry is justified. *United States v. Jenkins*, 329 F.3d 579, 581 (7th Cir. 2003). The court views the situation from the officers' perspective, and must decide whether they had an objectively reasonable belief that exigent circumstances existed.

Deputy Peter reasonably believed that Brandel had broken the plate glass window. The glass was not broken when he first arrived at the scene, he heard the breaking glass, and saw the gaping hole in the picture window. Brandel was the only person inside the apartment. The only reasonable inference to be drawn is that Brandel threw something at, and out, the window. The plaintiff offers no evidence to the contrary.

But the remaining facts are contested. Deputy Peter claims that Brandel threw something at him through the gaping hole in the window. Deputy Peter stated, and Officer McDonald corroborated, that Deputy Peter had to lean back to avoid the object; he perceived Brandel's act as an aggravated battery. At that point Brandel stood up and attempted to walk away, and Deputy Peter deployed his Taser, yelled commands at Brandel, and directed McDonald to kick down the door so they could enter the apartment.

Macklin tells a slightly different version. He states that as he talked to McDonald and Deputy Peter on the Maplewood side of the apartment, they could hear the sound of breaking glass. Macklin, Deputy Peter, and Officer McDonald went to the Georgetown side of the apartment and saw the broken window and items that had been tossed out the window. Macklin states that he did not see anything thrown out the window at the officers, does not think he saw the officers dodge anything coming out of the window, and did not hear them say anything about something that was thrown at them. Macklin states that he was in a position to see whether Brandel threw anything at the officers.

The defendants argue that Brandel committed felony destruction of property and aggravated assault against Deputy Peter. However, the damage to the apartment had been deemed a matter between landlord and tenant. The circumstances forming the basis of an aggravated assault against Deputy Peter are corroborated by McDonald but not by Macklin.

The defendants also argue that Brandel obstructed justice by ignoring the officers' lawful orders and fleeing to another room after being tased. However, the plaintiff contends that Brandel's action could be viewed as an effort to comply with Deputy Peter's orders to let them into the apartment.[4]

The defendants point to a frozen jar of jelly that was found in Georgetown Road later that night during the investigation. They argue that the fact that the jar appeared to be frozen indicates that the jelly could have been the object that Brandel threw at Deputy Peter because it does not appear to have been inadvertently lost or dropped on the road by a passer-by. But assuming that the jelly jar was indeed thrown by Brandel,[5] it could have been the item that broke

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[4] This argument is plausible. The broken window was adjacent to the door that Officer McDonald tried to kick in. Brandel could not have opened that door without moving his desk/hutch and computer equipment, which was along a wall and partially blocking the door. Brandel would had to move the desk or go to the other door. *See* d/e 63-21, p. 2.

[5] This is not a far-fetched assumption. Photos of Brandel's apartment show the general disarray and damage to the apartment, presumably by Brandel, who, according to Macklin, was

the window in the first place, and not something that was thrown at Deputy Peter as he stood by the broken window.

The tenant who called Macklin to report Brandel's erratic behavior told Macklin that Brandel had thrown something at the tenant's van. Throwing objects outside one's apartment toward a person, a vehicle, or onto a busy public roadway could constitute exigent circumstances, but taking the facts in the light most favorable to the plaintiff, it must be assumed that he did not throw anything at Deputy Peter or into the roadway.

Brandel's purported obstruction of justice was committed entirely in his own home. If a refusal to answer questions or allow police into the home is sufficient justification for police to force entry into the premises, there would be no need for a warrant or consent to enter. That is not the law.

There is a dispute of fact between the testimony of Macklin, who did not see anything thrown outside the window at the officers, and the testimony of the officers, who claim that something was indeed thrown at them, causing Deputy Peter to dodge the item thrown. There is also a dispute about whether, at the time the deputies entered the apartment, Brandel was complying with orders to let them in. In view of the factual disputes, the matter must be decided by the trier of fact.

Excessive force

The defendants argue that Cruppenink's use of deadly force was reasonable because Brandel posed a threat of serious harm either to him or to others in the immediate vicinity. The plaintiff argues that the deputies' testimony about Brandel's use of the splintered woodwork as a weapon is not supported by the physical evidence.

A police officer with probable cause to effectuate an arrest may use only the amount of force reasonably necessary to make the arrest. *Brooks v. City of Aurora, Ill.*, 653 F.3d 478, 486 (7th Cir. 2011). The court must consider (1) the severity of the crime committed; (2) any immediate threat to the safety of the police officers or others; and (3) whether there is active resistance to the arrest or an attempt to evade the arrest by flight. *Brooks*, 653 F.3d at 486. Effecting an in-home arrest poses unique risks to the arresting officers because it is the "adversary's 'turf' and there is the fear of "an ambush in a confined setting of unknown configuration." *Brooks*, 653 F.3d at 487. Whether force is needed, and the type to be used, is subject to change as the situation evolves. *Brooks*, 653 F.3d at 487.

In a deadly force case, the court on summary judgment must take "particular care" because the person in the best position to contradict the officers "is beyond reach." *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994). In this case, the deputies are the only witnesses to

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generally tidy. In the photo at d/e 63-21, p.2, there is what appears to be a jar of tomato sauce on the floor right next to the chair in which Brandel was allegedly sitting just before he was first tased, within a few feet of the broken window. However, on summary judgment the facts and inferences drawn from those facts must be viewed in the plaintiff's favor.

what happened inside the apartment. Their stories are basically consistent with one another, and any minor inconsistencies might be attributed to their failure to notice and remember everything in the same way during a rapidly-evolving situation.

In this case, the plaintiff points to evidence that is inconsistent with the deputies' version of events. First, the plaintiff argues that the forensic evidence is inconsistent with the video statements of Cruppenink and Deputy Peter, who both gestured that Brandel held the splintered woodwork like a spear near his right shoulder and jabbed it at Cruppenink. One of the bullets hit Brandel in the right arm near the elbow, exited, and entered his abdomen, going from right to left and downwards, which would place his right arm near his abdomen – significantly below his shoulder. This evidence is not necessarily dispositive, because there is no indication whether this was the first, second, or third shot. Brandel was also shot in his thigh; if the first shot was to the thigh, he could have (perhaps would have) lowered his hand to that area. But it is some evidence to support the plaintiff's argument that Brandel was not threatening the deputies as they say.

The plaintiff also argues that there is evidence that Brandel's hands were positioned in a defensive posture at the time of the shooting, citing the deposition testimony, pp. 78-79, of Dr. Denton who performed the autopsy. Page 79 was not provided to the court, but on page 78, Dr. Denton was asked if he saw anything or formed any opinions with respect to Brandel and whether he was in a defensive posture when he was shot. Dr. Denton stated that he did not form any such opinions.

The plaintiff further argues that the defendants' expert, Lance Martini, stated that the scene photographs showed the splintered woodwork in the "location and condition *at the time of the shooting*." The plaintiff contends that Martini places the splintered woodwork on the floor, and not in Brandel's hand. Yet, any photographs of the scene would have been taken not before or during the shooting, but afterward. The plaintiff also notes that the woodwork was on the floor when Brandel's blood dropped onto it. But Brandel would not have bled until after he was shot, after which it would have been unusual for Brandel to continue to hold a 5-foot-long piece of woodwork for any length of time. Still, "unusual" is not "impossible," and the plaintiff may try to persuade a jury on this issue.

The plaintiff argues that the State Police communications in the aftermath were very inconsistent with the testimony of the deputies. The plaintiff points to the State Police autopsy note indicating that Brandel was shot through the shower curtain while in the bathtub (which may or may not be supported by the evidence in the autopsy report). The initial State Police search warrant for Brandel's apartment listed a "shard of glass" as the weapon allegedly used by Brandel. Whether the State Police officials were given the correct information from those who spoke to the deputies, or whether the deputies' stories changed as the evening progressed, is not known. It is possible that something was lost in translation. There was a bullet hole in the shower curtain; one of the three bullets left grazing wounds on Brandel's hands and did not enter his body. Afterward, Brandel is said to have stepped into the tub, where he died. Also, the police photos of the broken window and the front porch show large shards of glass.

Consequently, in this case where Brandel cannot speak for himself, the forensic evidence must speak for him. Perhaps it does not speak clearly in his favor, but that is a question for the jury.

Qualified immunity

The defendants argue that they are entitled to qualified immunity. They contend that the law is clearly established in their favor: police may enter a house when probable cause and exigent circumstances exist. *United States v. Huddleston*, 593 F.3d 596, 600 (7th Cir. 2010). Moreover, they may use deadly force when an armed subject threatens a police officer or those in the immediate vicinity. *Estate of Starks v. Enyart*, 5 F.3d 230, 233 (7th Cir. 1993).

Under the circumstances of this case, the qualified immunity defense turns on factual disputes, and a trial is needed to resolve the those disputes. *Chelios v. Heavener*, 520 F.3d 678, 692 (7th Cir. 2008). When the facts are taken in the light most favorable to the plaintiff, they show that exigent circumstances did not exist. Macklin did not see anything thrown at Deputy Peter; and Brandel may have left the room in an attempt to comply with Deputy Peter's request to open the door. Moreover, Brandel may not have been resisting to the extent that it was necessary to use deadly force.

CONCLUSION

For the foregoing reasons, the motion for summary judgment [61] is denied. A final pretrial conference is scheduled for March 18, 2014, at 1:30 p.m. by personal appearance. Jury selection and jury trial are scheduled to begin on March 24, 2014, at 9:00 a.m.

Entered this 3rd day of February, 2014.

/s/Harold A. Baker

HAROLD A. BAKER
UNITED STATES DISTRICT JUDGE