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Via ECF

Hon. Leonard D. Wexler
United States District Court
100 Federal Plaza
Central Islip, New York 11722

Re: Cusumano v. Krumpter, et al. (16-CV-04376 (LDW)(ARL))

Dear Judge Wexler:

This office represents defendants, Nassau County Acting Police Commissioner Thomas C. Krumpter, Nassau County Police Officer Paul Cappy (“Cappy”) and the County of Nassau in the above-referenced action. The purpose of this letter is to respectfully request a pre-motion conference to allow defendants to file a motion for summary judgment pursuant to Fed. R. Civ. P. 56, on the ground that there are no genuine material issues of fact to be tried, and that the defendants are entitled to judgment as a matter of law.

Undisputed Facts. Plaintiff Salvatore Cusumano (“plaintiff”) is a resident of Nassau County. On July 14, 2015 plaintiff’s sister, Patty Nelson (“Nelson”), obtained a Nassau County Family Court Order of Protection against plaintiff, based upon her assertions that plaintiff physically threatened her over a dispute about the sale of the family home upon their mother’s death. Nelson, who was temporarily living in the home due to her divorce, was pressuring plaintiff to sell the home as quickly as possible. That day, members of the Nassau County Sheriff’s Department confiscated plaintiff’s Nassau County Pistol License and two handguns, and turned them over to the Nassau County Police Department’s Pistol License Section pursuant to New York State Penal Law and the Nassau County Police Department’s Pistol License Handbook. On July 15, 2015 plaintiff’s pistol license was suspended by the Pistol License Section. On July 17, 2015, after a hearing before the Family Court, the Family Court Judge vacated the Order of Protection against plaintiff.

Plaintiff telephoned Pistol License Section Officer Cappy on July 20, 2015 to inform him that the Order of Protection was vacated. On August 4, 2015 Cappy spoke with plaintiff and instructed him to write a notarized, detailed letter of explanation and a request to have his pistol license reinstated. On April 4, 2016 plaintiff sent a letter to Cappy informing him that plaintiff left the family home and moved to an apartment. On May 2, 2016 plaintiff informed Cappy that he sold the family home, and that all family members received their share of the proceeds. Plaintiff stated that he had no further contact with his Nelson, his sister. On June 14, 15 and 16, 2016 Cappy called Nelson to obtain her view on plaintiff’s handguns being restored to him, however, since she did not answer, Cappy left voice messages on all three days. On June 16, 2016 Cappy wrote a letter to Nelson asking her to contact him with regard to reinstating plaintiff’s pistol license. He never received a response from Nelson.

On June 27, 2016 Cappy recommended to Sgt. Adam Fischer (“Fischer”), his superior in the Pistol License Section, that plaintiff’s handgun license be reinstated. Pursuant to Police Department operational policy OPS 10023, “Removal and Dispositions of Weapons – Domestic Incidents / Threats to Public Safety,” on September 19, 2016 Fischer concurred, and forwarded his recommendation to the Seventh Precinct Deputy Commanding Officer, John Conti (“Conti”) for his review. On September 28, 2016 Fischer received confirmation from Conti that he concurred with Cappy and Fischer, and that plaintiff’s license should be restored, and his handguns returned to him. On October 4, 2016 Fischer received reinstatement approval from Chief of Department Steven Skrynecki. On October 2016 plaintiff renewed his license, and took possession of his two handguns from the Pistol License Section.

The Complaint. In his Complaint, plaintiff asserts that defendants violated his civil rights under the Second, Fifth and Fourteenth Amendments to the United States Constitution; a *Monell* claim; violation of due process, conversion, intentional infliction of emotional distress; and seeks a declaration that New York Penal Law § 400.00 is unconstitutional. The gravamen of the Complaint is plaintiff’s belief that the Pistol License Section took too long to return his handguns. The County Defendants filed their Answer on October 10, 2016. All discovery has been completed.

Grounds for Summary Judgment. Plaintiff’s Second Amendment claim is easily disposed of. The Supreme Court has held that the Second Amendment “codified a preexisting right” that includes an “individual right to possess and carry weapons in case of confrontation.” *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). The “right secured by the Second Amendment is not unlimited,” however, such that it does not protect a right “to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* at 626. Moreover, case law within this circuit indicates that the “right to bear arms” is not a right to hold some particular gun. *Perros v. County of Nassau*, 2017 WL 728711, at *3 (E.D.N.Y. Feb. 24, 2017) (Wexler, J.) (citation and quotation marks omitted).

Plaintiff’s Fifth Amendment and Fourteenth Amendment claims for deprivation of property without due process of law, should also be dismissed upon summary judgment. A procedural due process claim is composed of two elements: (1) the existence of a property or liberty interest that was deprived and (2) deprivation of that interest without due process.” *Bryant v. N.Y. State Educ. Dept.*, 692 F.3d 202, 218 (2d Cir. 2012). To establish deprivation of a property interest, a plaintiff must demonstrate an interest “in a benefit that is ‘more than an abstract need or desire for it ... [He] must, instead, have a legitimate claim of entitlement to it’ under state or federal law in order to state a § 1983 claim.” *Finley v. Giacobbe*, 79 f3d 1285, 1296 (2d Cir.1996). “[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion.” *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005).

Under New York Penal Law § 400.00[2], “A license for a pistol or revolver, other than an assault weapon or a disguised gun, shall be issued to (a) have and possess in his dwelling by a householder.” An applicant seeking a license to possess a pistol or revolver must file an application to the licensing officer in the county where the applicant resides, Penal Law § 400.00[3](a). In the County of Nassau, where plaintiff resides, the Nassau County Police Commissioner is the licensing officer. Penal Law § 265.00[10]. Each license holder receives a Pistol License Information Handbook. A handgun license issued by the Police Commissioner expires after five years, unless renewed, Penal Law § 400.00[10], but “may be revoked and cancelled at any time[.]” Penal Law § 400.00[11].

It is well settled that the issuance of a handgun license is a privilege, rather than a right, the issuance of which is committed to the sound discretion of the licensing official. *Beach v. Kelly*, 52 A.D.3d 436 (N.Y. App. Div. 2008). Licensing officers are vested with broad discretion in resolving issues regarding the fitness of individuals to possess firearms. *Simmons v New York City Police Dept. License Div.*, 35 A.D.3d 748 (N.Y. App. Div. 2006). A licensing officer is vested with broad discretion in making the determination to grant or deny a pistol permit to an individual and may do so for any good cause. *Dorsey v Teresi*, 26 AD3d 635 (N.Y. App. Div. 2006).

Based on the foregoing statutory and case law, defendants properly exercised their discretion in investigating the facts and circumstances of the Family Court Order of Protection before renewing plaintiff's pistol license and returning his handguns in an expeditious and timely manner. Therefore, plaintiff's Fifth and Fourteenth Amendment due process claims should be dismissed on summary judgment.

Since defendants never committed a constitutional violation, there is no unconstitutional County practice or policy to support plaintiff's *Monell* claim. Nor is there any evidence to support plaintiff's claim that New York Penal Law § 400.00 is unconstitutional. Finally, since all federal claims should be dismissed, the Court should decline supplemental jurisdiction over plaintiff's state law claims for conversion and intentional infliction of emotional distress. *Kolari v. N.Y. Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006).

Conclusion. For all the foregoing reasons, defendants respectfully request that the Court schedule a pre-motion conference for the purpose of allowing them to file a motion for summary judgment.

As always, defendants thank Your Honor for your attention and consideration in this matter.

Respectfully submitted,

/s/ Ralph J. Reissman
RALPH J. REISSMAN
Deputy County Attorney

cc: Robert T. Bean, Esq.
Attorney for Plaintiff (via ECF)