

Law Office of Robert T. Bean
3033 Brighton 3rd Street
Brooklyn, New York 11235
718-616-1414

Cell Phone: 484-838-9464
E-Mail: RBeanlaw@aol.com

Fax: 718-368-0981

Of Counsel for
Tanya Gendelman, P. C.

8-2-17

Via ECF

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

Re: Cusumano v. Krumpeter et al
Docket No.: CV 16-4376 (LDW) (ARL)

Dear Judge Wexler,

This office represents the plaintiff Salvatore Cusumano and files this letter in response to Defendants' letter requesting a pre-motion conference and in support of a pre-motion conference allowing plaintiff to file a cross-motion for summary judgment as a matter of law with regard to the violations of plaintiff's constitutional rights.

Facts. Plaintiff generally agrees with the facts as set forth in defendants' pre-motion conference letter, except left out was the incident that lead to the filing of this lawsuit. In the plaintiff's conversations with Officer Paul Cappy, an investigator in the Pistol Licensing Division, when plaintiff complained of the delay in having his license and pistols returned, Cappy accused him of challenging his authority and said he would get to it when he did, if ever. He then invited plaintiff to sue, which plaintiff did. Plaintiff filed suit August 5, 2016. His license and pistols were returned in October 2016

In other litigation Cappy testified that these investigations take about two hours total, including writing his recommendations. There is no explanation why it took a year and three months for plaintiff to have his license reinstated and his pistols returned. Particularly in this case as the Order of Protection was vacated on July 17, 2015. It would have taken Cappy about 30 seconds to read to read the order vacating the Order of Protection. Upon the vacation of the Order of Protection plaintiff was entitled to have his license and pistols returned. (Discovery has not yet been completed as represented by defendants, as Cappy's deposition has not yet been taken. It is scheduled for August 9, 2017 were Cappy will have an opportunity to explain this delay).

Grounds for Summary Judgment. Plaintiff had a fundamental, enumerated, individual right to possess a handgun, at least in his home. In *District of Columbia v. Heller* 554 U.S. 570,

128 S. Ct. 2783 (2008) discussing the scope of the right and level of scrutiny the Court stated at 2821 [18]:

The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

In *McDonald v. City of Chicago* 561 U.S. 742, 130 S. Ct. 3020 (2010) the Court found that the right to keep and bear arms is fundamental and incorporated that right under the due process clause of the 14th Amendment, stating at 791:

In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense . . . We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.

Denial of Due Process. It is clear that plaintiff had a constitutional right to his handguns and license. Once the dismissal of the Order of Protection was vacated, any further retention or delay in returning his license and handguns constituted a denial of constitutional rights, requiring at the very least, a “prompt post deprivation hearing” as set forth in *Razzano v. County of Nassau*, 765 F.Supp.2d. 176 E.D.N.Y. (2011) and *Panzella v. Sposato et al* _____ F.3d. _____ (2nd Cir., 2017) decided July 18, 2017, with defendant having the burden proof as to why the handguns and license should be retained. Those cases dealt with retained long guns but under *Heller* should apply equally to handguns. With regard to the delay in providing “due process” in the form of a post deprivation hearing, *Butler v. Castro*, 896 F.2d. 698 (2nd Cir. 1990) required that “within *ten days* of a timely demand, [the party in possession of the property] either return the item or items or instigate proceedings to justify their retention”. It should not have been necessary for plaintiff to file a federal civil rights action to get his license and guns returned.

Penal Law 400 Unconstitutional. Plaintiff agrees with the rendition of the law of the State of New York and the unlimited authority conferred on the pistol licensing officer to grant, deny, limit, delay, suspend or revoke a pistol license for any “good cause” he can articulate, at any time. Plaintiff agrees that New York considers a pistol license, and therefore the possession of a pistol as a **privilege** and not a **right**. Thus, the entire scheme is contrary to *Heller* and *McDonald* cited above. If New York makes possession of a pistol illegal without a license (PL 265) and one has a constitutional right to possess a pistol, then one has a constitutional right to a license.

Penal Law 400 gives the licensing officer power to allow the exercise of a constitutional right by one law abiding person, while on an *ad hoc* basis using vague undefined terms of any “good reason” and his own subjective opinions, deny that right to another law abiding person, on a “case-by-case” basis, exactly what *Heller* says cannot be done.

The Courts of New York continue to treat the possession of a pistol as a privilege. The

most recent pronouncement by a New York Appellate Court is *DeAngelo v. Burns* 124_A.D.3d 1156, (3rd Dept., 2015). In that case a pistol licensee was involved with a dispute with his neighbors during which he displayed his loaded handgun. He was charged with “brandishing” tried and acquitted. The jury believed the “brandishing” was done in self-defense. Even though he had committed no crime and had used his handgun for a constitutionally protected purpose, self-defense, his pistol license was revoked. The licensing officer did not believe he had the maturity, good character, temperament or judgment to have a pistol permit. In upholding the licensing officer’s decision the court held 1156:

There is no question that “[r]espondent is vested with broad discretion in determining whether to revoke a pistol permit and may do so for any good cause, including a finding that the petitioner lack[s] the essential temperament or character which should be present in one entrusted with a dangerous instrument ..., or that he or she does not possess the maturity, prudence, carefulness, good character, temperament, demeanor and judgment necessary to have a pistol permit”. . . .

Upon review, “respondent's resolution of factual issues and credibility assessments are accorded deference, and the determination will not be disturbed absent an abuse of discretion or a showing that [such determination] was made in an arbitrary and capricious manner”.

No other constitutional right is limited only to those persons “of good moral character,” with a government official unilaterally determining and defining that term on an *ad hoc* basis. No other constitutional right is denied for any “good reason,” with a government official determining on an *ad hoc* basis what that “good reason” might be. No other constitutional rights are denied because a government official subjectively finds that a person lacks “maturity, prudence, carefulness, good character, temperament, demeanor or judgment”. No other individual fundamental constitutional right can be summarily “revoked at any time” by a government official without notice, without the opportunity to be heard and without due process. In regard to no other constitutional right is a government official given “broad discretion” and his decision given “deference” in denying a person’s fundamental constitutional rights.

Therefore Penal Law 400 is unconstitutional. To paraphrase Justice Scalia in *Heller*, “A constitutional guarantee subject to [a licensing officer’s whims] is no constitutional guarantee at all.”

Sincerely,
/S/
Robert T. Bean

Via ECF and E-Mail
Carnell T. Foskey
Nassau County Attorney
Attn. Ralph Reissman
Deputy Nassau County Attorney
One West Street
Mineola, New York 11566