19-2431-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CLARISSE BENNETT,

Plaintiff-Appellant,

v.

DUTCHESS COUNTY, NEW YORK, DET. FRANK LETIZIA, SHERIFF ADRIAN "BUTCH" ANDERSON, DET. JAMES DANIELS,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York (White Plains)

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

Amy L. Bellantoni, Esq.
THE BELLANTONI LAW FIRM
Attorneys for Plaintiff-Appellant
2 Overhill Road, Suite 400
Scarsdale, New York 10583
914-367-0090

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, as the causes of action arose from violations of the U.S. Constitution. Final Judgment disposing of all claims was entered by the Clerk of the Court on July 8, 2019. Appellant timely filed a Notice of Appeal on August 5, 2019. Jurisdiction in this court is proper pursuant to 28 U.S.C. §1291.

ISSUES PRESENTED FOR REVIEW

Whether the district court erred by denying Appellant's cross-motion for summary judgment on her Fourteenth Amendment [post-deprivation procedural due process] claim.

Whether the district court erred by granting Defendants' motion for summary judgment on Appellant's Fourteenth Amendment claim.

Whether the district court erred by holding the government's continued retention of private property cannot violate the Fourth Amendment.

Whether the district court erred in dismissing Appellant's *Monell* claim.

STATEMENT OF THE CASE

On October 2, 2017, Clarisse Bennett ("Appellant") commenced the action below pursuant to 42 U.S.C. §1983 for violations of her civil rights as protected by the First, Second, Fourth, and Fourteenth Amendments to the United States

Constitution, as well as *Monell* liability against Dutchess County[1], New York. Defendant-Appellees ("Defendants") are Dutchess County, New York and Detectives Frank Letizia and James Daniels of the Dutchess County Sheriff's Office. [A12].

The action was presided over by the Hon. Vincent Briccetti and assigned Case No. 17 Civ. 7516. At the close of discovery, Defendants moved for summary judgment on Appellant's Second, Fourth, Fourteenth Amendment claims, *Monell* liability, and qualified immunity. [A12-A430; A537-A556][2]. Appellant cross-moved for summary judgment on her Fourth and Fourteenth Amendment claims. [A431-A536; A557-A587].

By Opinion and Order dated July 8, 2019, Judge Briccetti granted Defendants' motion for summary judgment in its entirety and denied Appellant's cross-motion. [A588]. *Bennett v Dutchess County*, 2019 WL 2918051, [SDNY July 8, 2019, No. 17 Civ. 7516 (VB)]. Judgment was entered by the Clerk of the Court on July 8, 2019. [A598]. Appellant timely filed a Notice of Appeal on August 5, 2019. [A599].

[1] Plaintiff's First and Second Amendment claims were withdrawn as were the claims against Sheriff Adrian "Butch" Anderson.
[2] References to the Appendix are cited as "A ___".

SUMMARY OF THE ARGUMENTS

On October 7, 2016, acting pursuant to a Revocation Order for the New York State pistol license of Appellant's husband, Kelvin Bennett, Sheriff's Deputy Aaron Malone seized all of Mr. Bennett's handguns. [A368-A369; A90-A93; A87]. The Revocation Order was initiated by Mr. Bennett's conviction of Driving While Intoxicated as a felony. [A88].

At the time of the seizure, Appellant held a valid New York State Pistol License, which was unaffected by the Revocation Order. [A86; A88]. All but one of Appellant's handguns were also registered to Mr. Bennett's pistol license. [A134; A84; A86; A90-93].

Deputy Malone also seized each of Appellant's handguns, including the handgun that was not listed on Mr. Bennett's pistol license, as well as all shotguns and rifles in Appellant's home, which were co-owned by Appellant and Mr. Bennett. [A134; A84; A86; A90-93].

The Revocation Order did not apply to Mr. Bennett's long guns. [A87-A88; A286]. Deputy Malone seized every firearm in Appellant's home because Mr. Bennett was legally ineligible to possess firearms because of his felony conviction. [A368-A369].

Each seized handgun was owned by Appellant and registered to her New York State pistol license. [A86; A90-A93]. With the exception of one rifle, each

long gun seized by Deputy Malone also belonged to Appellant. [A138-A139; A332].

On March 13, 2017, Appellant contacted the Sheriff's Office by phone to retrieve her firearms. [A490-A492]. Appellant spoke with Det. Frank Letizia, head of the Pistol License Division. [A152-A153; A176-A177; A489]. Det. Letizia told Appellant that her firearms would not be returned while Mr. Bennett was living in the house because "felons can't have guns." [A152-A153; A176-A177].

Det. Letizia denies speaking with Appellant. [A286-A287].

Detective James Daniels is the Property Custodian for the Dutchess County Sheriff's Office. [A316]. Det. Daniels' notes from his conversation with Det. Letizia indicate, "**Deny** Per Det. Letizia, she admitted that her husband is living in residence (convicted felon). Refer to Letizia for further 10/7/16". [A498]. Under Det. Daniels' handwritten notes is a picture of Appellant's NYS Driver's License and her phone number. [A498].

Any request for the return of firearms must be approved by Det. Letizia. [A325-A327; A339-A340]. Only if Det. Letizia permits their release, Det. Daniels (Property Custodian) gathers the paperwork (including Det. Letizia's approval), and presents it to Chief Mark as the final approval for the release of property. [A316-A317; A325-A326; A405-A407].

By letter to Defendants dated May 30, 2017, Appellant's attorney requested the return of Appellant's firearms. [A103]. Det. Letizia and Det. Daniels received counsel's letter; they did not respond, nor did they speak about it with Sheriff Butch Anderson or Chief Jason Mark. [A292-A293; A325-A326].

In August 2017, Dutchess County created a written policy and procedure for the Sheriff's Office return of firearms entitled, "Dutchess County Return of Firearm Policy" (the "Policy"). [A503-A506]. Prior to August 2017, Defendants had no post-deprivation procedure in place to ensure due process.

Section III of the Policy provides, "1. In the event firearms are seized for any other law enforcement purpose, but not pursuant to a court[3] or mental hygiene order, upon request for their return, the Sheriff shall determine within thirty days if return is appropriate. 2. If the Sheriff determines that return is not appropriate, he shall notify the owner in writing of the reasons for this decision and advise the owner that s/he may request a hearing to challenge the decision." [A506].

Defendants never provided notice to Appellant of any 'safe storage' Grounds for refusing to release her firearms, in writing or otherwise, nor was she

[3] The 'court orders' identified in the Policy are limited to active criminal cases, family Offenses, and/or active orders of protection that prohibit the owner of possessing firearms. Defendants did not rely on any provision of the Policy in their defense below.

advised of her right to request a hearing to challenge Defendants' decision not to release her property. [A525-A536].

The only reason provided to Appellant for Defendants' refusal to return her firearms was her cohabitation with Mr. Bennett, who is ineligible to possess firearms by virtue of his conviction. [A152-A153; A175-A177; A535-A536].

On October 2, 2017, Appellant commenced the action below. [A3].

From October 7, 2016 through December 2017, Defendants' sole reason for retaining Appellant's property was her cohabitation with Mr. Bennett. [A535-A536].

Det. Letizia did not have any communication with Deputy Malone or Deputy McKay (who accompanied Deputy Malone) after the firearms were seized from Appellant's home. [A285]. Deputy Malone's incident report did not mention where the firearms were located in Appellant's home or how they were stored. [A515]. Defendants did not know, nor did they ask, whether Appellant had the ability to secure her firearms from her husband's access. [A535-A536; A285].

Neither Det. Letizia nor Det. Daniels knew where the firearms were located when Deputy Malone seized them, where they were stored, or how they were safeguarded prior to the filing of the federal complaint. [A285].

After the lower court action was commenced, Defendants conditioned the return of Appellant's firearms on her purchase of a new safe. [A153-A154]. For the first time, "safe storage" compliance with Penal Law §265.45 was raised as Defendants' reason for not returning Appellant's firearms. [A153-A154]. Appellant did not, in fact, need to purchase a second gun safe to be in compliance with Penal Law §265.45. [A535-A536].

When Appellant purchased a second safe in December 2017, Defendants released her firearms. [A167]. Det. Letizia inspected the safe, but asked no questions about whether Kelvin Bennett had any access to the firearms or the safe. [A167-A168; A535-A536].

STANDARD OF REVIEW

The standard for reviewing a district court's ruling on cross-motions for summary judgment is *de novo*, construing the evidence in the light most favorable to the non-moving party. *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Agric.*, 613 F.3d 76, 83 (2d Cir. 2010); see also *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 103 (2d Cir. 2010) (noting that the scope of review does not change in the context of cross-motions for summary judgment).

LEGAL ARGUMENT

I. THE DISTRICT COURT'S DENIAL OF APPELLANT'S MOTION FOR SUMMARY JUDGMENT ON HER FOURTEENTH AMENDMENT CLAIM SHOULD BE REVERSED

The denial of Appellant's cross-motion for summary judgment on her post-deprivation Fourteenth Amendment claim was in error and should be reversed. Viewing the record in the light most favorable to Defendants[4], Det. Letizia denies speaking with Appellant in March 2017. [A286-A287]. Thus, the first communication to Defendants from Appellant was her attorney's May 30, 2017 letter requesting the return of her firearms. Det. Letizia and Det. Daniels received the letter and ignored it. [A292-A293; A325-A326].

Upon receipt of the May 2017 letter, Defendants were required to provide Appellant with prompt notice of their reasons for not releasing her property. See, e.g., *Spinelli v. City of New York*, 579 F.3d 160, 174 (2d Cir. 2009) (government must provide notice and a prompt post-deprivation hearing without waiting for the property owner to seek the return of her property.) Such notice "must set forth the alleged misconduct with particularity. The particularity with which alleged misconduct must be described varies with the facts and circumstances of the individual case; however, due process notice contemplates specifications of

[4] *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 702 F.3d 685, 692 (2d Cir. 2012) (citing Fed. R. Civ. P. 56(c)).

acts or patterns of conduct, not general, conclusory charges unsupported by specific factual allegations." *Spinelli*, 579 F.3d at 172 (internal quotations and citations omitted). "Notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* citing, *Dusenbery v. United States*, 534 U.S. 161, 168 (2002).

Neither the district court nor Defendants have identified any notice to Appellant. Despite her attorney's letter in May 2017 and the County's promulgation of a "Return of Firearm Policy" in August 2017 [A502], Appellant never heard from Defendants after her property was seized.

The district court's decision acknowledged that the government is required to provide post-deprivation notice but excused Defendants' failure to provide any. Indeed, the court held that no notice was required because Appellant should have known why her firearms were not being released by Defendants.

Counsel's May 30, 2017 letter set forth in detail Appellant's understanding of why Defendants would not release her firearms, which was dissimilar to the reason proffered by Defendants after the action was commenced. Specifically, counsel's letter apprised Defendants of Appellant's prior request for the return of her property and the Sheriff's Office's response that "it was the policy of the Dutchess County Sheriff's Office not to return property to individuals who

reside with an individual who is barred from possessing firearms and/or long guns." [A103]. The letter advised Defendants, "This policy is a direct violation of [Appellant's] Constitutional Rights." [A103].

If safe storage, and not the County's blanket policy of retaining the firearms of individuals who reside with convicted felons, was Defendants' reason for not releasing Appellant's firearms, Defendants were required to so advise Appellant.

Appellant was never informed of Defendants' purported "safe storage" grounds nor was she afforded an opportunity to be heard regarding such reasons– until the original action was commenced and Defendants retained counsel.

Defendants remained silent in the face of the May 2017 letter, which perpetuated Appellant's belief that their reason for retaining her firearms was Mr. Bennett's continued residence in their home. Indeed, from October 7, 2016 through December 2017, the sole reason advanced by Defendants for retaining Appellant's property was Mr. Bennett's residence in the home. [A534].

The district court's belief that, since Appellant knew why the firearms were seized in the first instance (Mr. Bennett's felony conviction), she therefore knew why Defendants refused to release them, constituted an improper finding of fact and is refuted by the record evidence. Appellant knew that the firearms were seized because the police were "given orders to take the firearms." [A144].

Appellant was then informed by Det. Letizia that they would not be returned because she lived with Mr. Bennett. [A175-A177].

B. Defendants provided no opportunity to be heard

If Defendants' refusal to return Appellant's property was not based on her cohabitation with Mr. Bennett, as Det. Letizia informed her, they were obligated to provide specific notice of their grounds so Appellant could address their concerns and secure the release of her property. *Spinelli v. City of New York*, supra.

Defendants' failure to communicate their [purported] safe storage concerns deprived Appellant of the opportunity to demonstrate her ability to secure her firearms from Mr. Bennett in compliance with Penal Law §265.45. Had Defendants provided notice of a 'storage' concern, Appellant would have been able to address the issue, regain prompt repossession of her property, and avoid the need for litigation. [A535].

The return of Appellant's firearms in December 2017 did not come as a result of Defendants' affording her due process, but in spite of its absence. *Spinelli v. City of New York*, 579 F3d at 172. Had Plaintiff not been able to retain an attorney or institute a federal lawsuit, her property would still be in the possession of the Sheriff's Office.

C. The 'notice' requirement does not equate to 'dispensing legal advice'

The lower court's decision, and Defendants' arguments, seem to equate the notice requirement with giving out legal advice. This view of post-deprivation due process improperly places the burden on the property owner and turns due process on its head.

Defendants were not called upon to 'instruct' Appellant on the language of the Safe Act, nor were they obligated to instruct her on the law. Defendants were, however, required to provide Appellant with notice of the specific reasons why they would not release her firearms so that she could be heard on those issues. Viewing post-deprivation notice as legal advice that law enforcement has no obligation to provide eviscerates the notice requirement.

D. Penal Law §265.45 Did Not Preclude Return of Appellant's Firearms

Contrary to the lower court decision, the language of Penal Law §265.45 does not provide Appellant with the requisite notice of Defendants' reasons for not releasing her property. Indeed, §265.45 does not "prohibit[] an individual who resides with a convicted felon from possessing firearms unless the individual ensures the convicted felon cannot access the firearms…" [A589-A590].

There is no state or federal prohibition to the possession of firearms by an individual who resides with a convicted felon.

Penal Law §265.45 does not prevent possession of firearms in the first instance; it imposes a criminal penalty upon individuals who fail to secure their firearms from certain prohibited persons identified in the statute. Thus, Appellant's possession of firearms was not prohibited by law, notwithstanding her cohabitation with Mr. Bennett.

E. Defendants Failed to Follow Subsequently Created Policy

The lower court's decision does not mention that in August 2017 Dutchess County implemented a written post-deprivation due process procedure for the Dutchess County Sheriff's Office entitled, "Dutchess County Return of Firearm Policy" (the "Policy") in August 2017. [A503-A506].

Section III of the Policy provides, "1. In the event firearms are seized for any other law enforcement purpose, but not pursuant to a court[5] or mental hygiene order, upon request for their return, the Sheriff shall determine within thirty days if return is appropriate. 2. If the Sheriff determines that return is not appropriate, he shall notify the owner in writing of the reasons for this decision and advise the owner that s/he may request a hearing to challenge the decision." [A506].

[5] The 'court orders' identified in the Policy are limited to active criminal cases, family offenses, and/or active orders of protection that prohibit the owner of possessing firearms. Defendants did not rely on any provision of the Policy in their defense below.

In the face of the County's written policy, the individual Defendants persisted in the refusal to provide Appellant with post-deprivation due process. No notification was provided to Appellant of the reasons for the decision to retain her firearms, whether in writing or otherwise, nor was she advised of her right to request a hearing to challenge the decision, as required by the County's firearms policy. [A506].

Based on the above, the district court's denial of Appellant's cross-motion for summary judgment as to her Fourteenth Amendment post-deprivation claim should be reversed.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED AS TO APPELLANT'S FOURTEENTH AMENDMENT CLAIM

Viewing the record in the light most favorable to the non-moving Appellant, Defendants' motion for summary judgment should have been denied for the same reasons set forth in Point I.

III. THE DISTRICT COURT'S DENIAL OF APPELLANT'S MOTION FOR SUMMARY JUDGMENT ON HER FOURTH AMENDMENT CLAIM SHOULD BE REVERSED

A. Initial Seizure of Appellant's Firearms

A seizure of property within the meaning of the Fourth Amendment occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.

Ct. 1652, 80 L. Ed. 2d 85 (1984). For the seizure to be actionable under 42 U.S.C. §1983, the plaintiff also must show state action. *Id.* The government must offer post-seizure evidence to justify continued retention of the seized property, otherwise the conduct runs afoul of the Fourth Amendment. See, e.g., *Krimstock v Kelly*, 306 F3d 40, 43, 50-51 (2d Cir 2002).

Contrary to the lower court's decision [A593], Appellant did not concede that the initial seizure of her firearms was lawful. [A454 at fn 3]. Defendants failed to establish probable cause for the seizure of Appellant's firearms in the first instance, thus their continued retention of her firearms violated her property rights as protected by the Fourth Amendment. See, e.g., *Krimstock v Kelly*, 306 at 50 ("If the government, once challenged, cannot establish probable cause for the initial seizure or offer post-seizure evidence to justify continued impoundment, retention of the seized property runs afoul of the Fourth Amendment.").

The seizure of Appellant's long guns and the handgun registered to her NYS pistol permit lacked probable cause. Defendants' continued possession of Appellant's aforementioned firearms between October 2016 and December 2017 was unjustified, as Appellant had the means of securing the firearms from Mr. Bennett. [A534].

B. Continued Retention of Appellant's Property

The Fourth Amendment regulates all interferences with property, not merely the initial acquisition of possession. See, *United States v. Place*, 462 U.S. 696, 706, 709-10, 77 L. Ed. 2d 110, 103 S.Ct. 2637 (1983) (holding that the initial seizure of a suitcase was valid but that the ninety-minute detention of the suitcase violated the Fourth Amendment); *Mom's, Inc. v Willman*, 109 F App'x 629, 637 (4th Cir 2004) (police violated plaintiff's Fourth Amendment rights by failing to return personal property seized pursuant to a search warrant). See *Nelson v. Streeter*, 16 F.3d 145, 151 (7th Cir. 1994).

In *United States v Place*, law enforcement seized the defendant's suitcase at the airport and retained it for 90 minutes before a "canine sniff test" indicated the presence of narcotics. The seizure occurred on a Friday; that Monday, the agents obtained a judicial search warrant for the suitcase. However, the Supreme Court held that the 90-minute seizure of the defendant's suitcase prior to the canine sniff test "sufficient to render the seizure unreasonable" and a violation of the defendant's Fourth Amendment rights. *Id.*

At some point into the government's seizure of property, its possession ceases to be a justifiable detention and instead becomes a seizure requiring a showing of probable cause. See, e.g., *United States v. Sharpe*, 470 U.S. 675, 685, 84 L. Ed. 2d 605, 105 S. Ct. 1568 (1985) ("obviously, if an investigative stop

continues indefinitely, at some point it can no longer be justified as an investigative stop"); *United States v Cosme*, 796 F3d 226, 235 (2d Cir 2015) (determining a two-year seizure exceeded the exigent circumstances exception where government never sought a warrant).

Even assuming *arguendo*, that the initial seizure of Appellant's firearms from her home by the Sheriff's Deputy was reasonable based on her husband's ineligibility to possess firearms and the revocation of his pistol license, once Defendants were aware of Appellant's protected property interest in the seized firearms, at the very minimum, they were required to conduct an inquiry into her eligibility to possess the firearms, i.e., the validity of her New York State Pistol License and a criminal history to ascertain the existence of any statutory prohibitors to firearm possession. An inquiry in March 2016 would have revealed no bar to Appellant's possession firearms, at which time Defendants were required to initiate the return of her property. Defendants' continued retention of Appellant's property for over 9 months constitutes an unreasonable seizure in violation of the Fourth Amendment.

The government's continued seizure of property cannot be justified absent probable cause. *United States v Place*, supra. The length of the detention is an important factor in determining the intrusiveness. *United States v Hooper*, 935 at 495 citing, *United States v Place*, supra. In considering the length

of the detention, the court should consider the diligence with which the government pursued their investigation. *Id.*

Once Appellant informed Defendants of her ownership interest in the firearms, Defendants were under a duty to diligently ascertain whether there was probable cause to deny her request for their return. Defendants conducted no inquiry or investigation, and took no steps, to facilitate the return of Appellant's property. Detective Letizia had no knowledge of where Appellant's firearms were stored or from where they were seized; storage was not a thought. [A285; A515]. Neither Det. Letizia nor Det. Daniels knew where the firearms were located when they were seized, where they had been stored, or how they were safeguarded prior to the filing of the federal complaint. [A285]. Defendants did not know, nor did they ask, whether Appellant had the ability to secure her firearms from her husband's access. [A285; A535-A536].

IV. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO APPELLANT'S FOURTH AMENDMENT CLAIM SHOULD HAVE BEEN DENIED

Viewing the record in the light most favorable to Appellant, the sole reason Defendants refused to return her firearms was that she lived with Mr. Bennett. Prohibiting the possession of firearms because the owner resides with an ineligible person violates the Fourth Amendment.

The government's refusal to return Appellant's firearms because she lived with a person ineligible to possess firearms, constituted an unlawful and material interference with her property rights in violation of the Fourth Amendment. In other words, Defendants' continued seizure of Appellant's property was unreasonable because they deprived Appellant of her property based on the ineligibility of her husband.

Det. Letizia denied telling Appellant that her firearms would not be returned unless Mr. Bennet was no longer living in her home [A286-A287], which creates a genuine issue of material fact warranting a trial.

As such, the lower court's decision granting Defendants' motion for Summary judgment on Appellant's Fourth Amendment claims should, most respectfully, be reversed.

V. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO APPELLANT'S *MONELL* CLAIM SHOULD HAVE BEEN DENIED

Det. Letizia is the gatekeeper for the release of firearms. Any request for the return of firearms must be approved by Det. Letizia. [A325-A327; A339-A340]. Only if Det. Letizia approves a request for the return of firearms, does Det. Daniels, Property Custodian, forward the paperwork to Chief Mark as the final approval for the release of property. [A316-A317; A325-A326].

If Det. Letizia permits their release, Det. Daniels (Property Custodian) gathers the paperwork (including Det. Letizia's approval), and presents it to

Chief Mark, the Detective Sergeant at the time, 'signed off' on the release of property. [A405-A407]. Chief Mark had no communication with Det. Letizia, Det. Daniels, Sheriff Anderson or the Undersheriff prior to receiving the paperwork from Det. Daniels on December 20, 2017. [A408]. Like Det. Letizia and Det. Daniels, Chief Mark had no idea where Appellant's firearms were stored prior to December 20, 2017. [A412-A413].

It was the policy of the Dutchess County Sheriff Department to invest Det. Letizia with the power and authority to control when firearms are returned to their owners. If Det. Letizia denied the request, no further action is taken to return the property. This is borne out through the record evidence, including Det. Daniels' handwritten notes from his conversation with Det. Letizia, "Deny Per Det. Letizia, she admitted that her husband is living in residence (convicted felon). Refer to Letizia for further 10/7/16". [A498]. Under Det. Daniels' handwritten notes is a picture of Appellant's NYS Driver's License and her phone number. [A498].

No other policy and practice existed until the Dutchess County Law Department implemented a "Return of Firearms Policy" in August 2017. [A502]. Even then, Defendants refused to adhere to the requirements of due process.

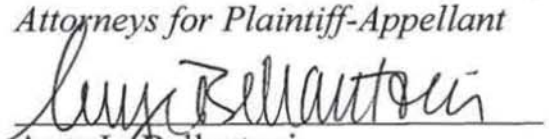
Based on the above, the lower court's dismissal of Appellant's *Monell* claim against Dutchess County should, most respectfully, be reversed.[6]

CONCLUSION

For the foregoing reasons, the Opinion and Order of the district court dated July 8, 2019 granting Defendants' motion for summary judgment and denying Appellant's cross-motion as to her Fourth and Fourteenth Amendment claims should be reversed in all aspects and remanded to the district court for proceedings consistent herewith.

Dated: Scarsdale, New York
November 11, 2019

THE BELLANTONI LAW FIRM, PLLC
Attorneys for Plaintiff-Appellant

By: 

Amy L. Bellantoni
2 Overhill Road, Suite 400
Scarsdale, New York 10583
(914) 367-0090 (t)
(888) 763-9761 (f)

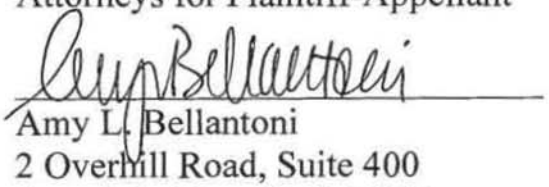
[6] The district court's decision did not reach the issue of qualified immunity, however, Appellant maintains that Defendants are not entitled to qualified immunity for the reasons set forth in the papers submitted below.

CERTIFICATE OF COMPLIANCE WITH FRAP 32(g)(1)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 4,266 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7).

2. This brief complies with the typeface requirements of Fed. R. App.P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

THE BELLANTONI LAW FIRM, PLLC
Attorneys for Plaintiff-Appellant

By: 
Amy L. Bellantoni
2 Overhill Road, Suite 400
Scarsdale, New York 10583
(914) 367-0090 (t)
(888) 763-9761 (f)

SPECIAL APPENDIX

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SPAT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLARISSE BENNETT, Plaintiff, v. DUTCHESS COUNTY, NEW YORK; DETECTIVE FRANK LETIZIA; SHERIFF ADRIAN "BUTCH" ANDERSON; and DETECTIVE JAMES DANIELS, Defendants.	:	**OPINION AND ORDER** 17 CV 7516 (VB)

Briccetti, J.:

Plaintiff Clarisse Bennett brings this action under 42 U.S.C. § 1983 against defendants Dutchess County, Detective ("Det.") Frank Letizia, Sheriff Adrian "Butch" Anderson, and Det. James Daniels, alleging defendants confiscated certain firearms in violation of her constitutional rights under the Fourth and Fourteenth Amendments.[1]

Before the Court are defendants' motion for summary judgment (Doc. #31) and plaintiff's cross-motion for summary judgment (Doc. #37).

For the reasons set forth below, defendants' motion is GRANTED, and plaintiff's motion is DENIED.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

[1] Plaintiff initially claimed defendants also violated her First and Second Amendment rights and conspired to violate her constitutional rights. In her cross-motion for summary judgment, however, plaintiff affirmatively withdrew her claims under the First and Second Amendments and her claims against Sheriff Anderson. (Doc. #39 ("Pl. Opp.") at 1 n.1). Further, plaintiff fails to defend her conspiracy claims, and thus those claims are deemed abandoned and dismissed. Jackson v. Fed. Exp., 766 F.3d 189, 198 (2d Cir. 2014).

BACKGROUND

The parties have submitted briefs, affidavits and declarations with supporting exhibits, and statements of material fact pursuant to Local Civil Rule 56.1, which reflect the following factual background.

Plaintiff and her husband Kelvin Bennett reside in Poughkeepsie, New York, in Dutchess County. In 2016, they jointly owned at least ten pistols and ten long guns.[2] Mr. Bennett individually owned an AK-47 semi-automatic rifle. Both plaintiff and Mr. Bennett held pistol permits issued by Dutchess County for the firearms that required a license. Plaintiff is a certified National Rifle Association ("NRA") pistol safety instructor.

The Bennetts stored their firearms in a bedroom closet locked with a combination padlock, and inside the closet, many of the weapons were further locked in a safe that could only be opened with a key. Some of the weapons, but not all, also had trigger locks. Plaintiff and her husband each had the combination to the closet and the key to the safe and trigger locks.

In August 2016, Mr. Bennett pleaded guilty to driving while intoxicated with a minor in his car in violation of N.Y. Vehicle and Traffic Law § 1192(2-a)(b), a Class E felony under state law punishable by more than one-year imprisonment. Id. § 1193(1)(c)(i)(B). He was sentenced to five years' probation.

Both federal and New York law prohibit a person convicted of a felony from possessing a firearm. See 18 U.S.C. § 922(g)(1) (federal law); N.Y. Penal Law § 265.01(4) (New York law). As relevant here, New York law also prohibits an individual who resides with a convicted felon from possessing firearms unless the individual ensures the convicted felon cannot access the

[2] Plaintiff also claims she individually owns a Mark III Target pistol. However, records of the pistol's purchase indicate both plaintiff and her husband purchased and owned the pistol. (Doc. #42-1).

firearms by, for example, storing the firearms in a safe or other storage container with a combination lock or key to which the felon has no access. See N.Y. Penal Law § 265.45 (also known as the "Safe Storage Act").

In addition to the state and federal prohibition on Mr. Bennett's possession of any firearm, on October 5, 2016, the Dutchess County Court issued an order of revocation, revoking Mr. Bennett's pistol license.

On October 7, 2016, two deputies from the Dutchess County Sheriff's Office contacted Mr. Bennett to arrange for the confiscation of Mr. Bennett's firearms. When the deputies arrived, the Bennetts were cooperative. Mr. Bennett showed them where the firearms were stored and unlocked the closet and interior safe. There was no conversation about plaintiff's interest in the weapons. The deputies inventoried the firearms, leaving Mr. Bennett a receipt, and left.

On March 13, 2017, plaintiff claims she called the Sherriff's Office to inquire about the return of her firearms. According to plaintiff, Det. Letizia said "guns cannot live with felons"—essentially implying plaintiff could only recover the firearms if she did not live with her husband. (Doc. #38-3 ("Pl. Dep.") at 44–45). According to Det. Letizia, he and plaintiff never had such a conversation or ever spoke on the telephone.

On May 30, 2017, plaintiff's counsel sent a letter to Sheriff Anderson, Det. Daniels, and Det. Letizia requesting the return of plaintiff's firearms. Defendants did not return the firearms.

On October 2, 2017, plaintiff filed this action.

On November 18, 2017, upon the advice of her attorney, plaintiff purchased a $1,200 safe that could safely store all twenty firearms.

In December 2017, Det. Letizia learned plaintiff purchased a safe and he inspected it at her home. Several days later, plaintiff was permitted to pick up her firearms from the Sheriff's Office.

DISCUSSION

I. Legal Standard

The Court must grant a motion for summary judgment if the pleadings, discovery materials before the Court, and any affidavits show there is no genuine issue as to any material fact and it is clear the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

A fact is material when it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Factual disputes that are irrelevant or unnecessary" are not material and thus cannot preclude summary judgment. Id.

A dispute about a material fact is genuine if there is sufficient evidence upon which a reasonable jury could return a verdict for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. at 248. The Court "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." Wilson v. Nw. Mut. Ins. Co., 625 F.3d 54, 60 (2d Cir. 2010) (citation omitted). It is the moving party's burden to establish the absence of any genuine issue of material fact. Zalaski v. City of Bridgeport Police Dep't, 613 F.3d 336, 340 (2d Cir. 2010).

If the non-moving party has failed to make a sufficient showing on an essential element of his case on which he has the burden of proof, then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. at 323. If the non-moving party submits "merely colorable" evidence, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. at 249–50. The

non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts, and may not rely on conclusory allegations or unsubstantiated speculation." Brown v. Eli Lilly & Co., 654 F.3d 347, 358 (2d Cir. 2011) (internal citations omitted). The mere existence of a scintilla of evidence in support of the non-moving party's position is likewise insufficient; there must be evidence on which the jury could reasonably find for him. Dawson v. Cty. of Westchester, 373 F.3d 265, 272 (2d Cir. 2004).

On summary judgment, the Court construes the facts, resolves all ambiguities, and draws all permissible factual inferences in favor of the non-moving party. Dallas Aerospace, Inc. v. CIS Air Corp., 352 F.3d 775, 780 (2d Cir. 2003). If there is any evidence from which a reasonable inference could be drawn in favor of the non-moving party on the issue on which summary judgment is sought, summary judgment is improper. See Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc., 391 F.3d 77, 83 (2d Cir. 2004). The Court need only consider evidence that would be admissible at trial. Nora Beverages, Inc. v. Perrier Grp. of Am., Inc., 164 F.3d 736, 746 (2d Cir. 1998).

II. Fourth Amendment Claim

Defendants argue they are entitled to summary judgment on plaintiff's Fourth Amendment claim because the Fourth Amendment does not protect against the government's failure to return lawfully seized property.

The Court agrees.

The Fourth Amendment prohibits unreasonable seizures. "A seizure occurs when there is some meaningful interference with an individual's possessory interest in his or her property." United States v. Jacobsen, 466 U.S. 109, 113 (1984) (internal quotation marks omitted). However, when an individual freely consents to the surrender of her property after an officer's

lawful entry, such a seizure is reasonable. Kaminsky v. Schriro, 760 F. App'x 69, 72 (2d Cir. 2019) (summary order).

Furthermore, the government's failure to return lawfully seized property is not an unreasonable seizure under the Fourth Amendment. Shaul v. Cherry Valley-Springfield Cent. Sch. Dist., 363 F.3d 177, 187 (2d Cir. 2004). In other words, the government's continued retention of property does not constitute an additional seizure or transform a lawful seizure into an unlawful one. Malapanis v. Regan, 335 F. Supp. 2d 285, 291 (D. Conn. 2004) (citing Fox v. Van Oosterum, 176 F.3d 342, 351 (6th Cir. 1999)).

Plaintiff concedes the initial seizure of the jointly owned licensed firearms was lawful—the deputies consensually entered the Bennetts' home at a prearranged time carrying the Dutchess County Court's order of revocation. Therefore, under well-settled Circuit precedent, plaintiff has no Fourth Amendment claim against defendants for retaining those lawfully seized firearms.

The seizure of the unlicensed long guns was also lawful, even though the long guns were not within the scope of the order of revocation. Neither plaintiff nor Mr. Bennett dispute that they consented to the deputies' seizure of the guns. Even if the Bennetts had objected, the deputies could have seized the firearms in plain view as contraband, because as a convicted felon, Mr. Bennett was prohibited under federal and state law from possessing any firearms. See Minnesota v. Dickerson, 508 U.S. 366, 375 (1993). Under those circumstances, the deputies' seizure of all the firearms, including the long guns, was lawful. Because the seizure was lawful, defendants' failure to return those firearms therefore cannot constitute a Fourth Amendment violation.[3]

[3] Plaintiff also argues the seizure of the Mark III Target pistol was improper because she owned it individually. However, the evidence shows the gun was jointly owned by plaintiff and

Accordingly, defendants are entitled to summary judgment on plaintiff's Fourth Amendment claim, and plaintiff's cross-motion is denied.

III. Fourteenth Amendment Claim

Plaintiff creatively argues that when defendants learned she had an ownership interest in the firearms, their failure to inform her of the Safe Storage Act or how to comply with it violated her Fourteenth Amendment right to procedural due process.

The Court is not persuaded.

The Fourteenth Amendment commands that "[n]o State shall . . . deprive any person of . . . property, without due process of law." U.S. Const. amend. XIV. "The touchstone of due process, of course, is 'the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'" Spinelli v. City of New York, 579 F.3d 160, 169 (2d Cir. 2009) (internal parentheses in original) (quoting Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976)). Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Dusenbery v. United States, 534 U.S. 161, 168 (2002) (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950)). Notice "must set forth the alleged misconduct with particularity," although "[t]he particularity with which alleged misconduct must be described varies with the facts and circumstances of the individual case." Spinelli v. City of New York, 579 F.3d at 172.

To provide constitutional due process, law enforcement agencies are not required to provide detailed and specific instructions on available state law remedies to property owners who

her husband. Furthermore, even assuming it was not owned by Mr. Bennett, its seizure was reasonable and lawful for the same reason that the long guns were reasonably and lawfully seized—state and federal laws prohibited Mr. Bennett from possessing any firearm.

seek the return of lawfully seized property. See City of W. Covina v. Perkins, 525 U.S. 234, 241 (1999). Individuals have a responsibility to educate themselves about the law. To be sure, "[t]he entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny." Atkins v. Parker, 472 U.S. 115, 131 (1985). State law remedies "are established by published, generally available state statues and case law." City of W. Covina v. Perkins, 525 U.S. at 241. "Once the property owner is informed that his property has been seized, he can turn to these public sources to learn about the remedial procedures available to him." Id.

Here, due process did not require defendants, upon learning in March or May 2017 of plaintiff's ownership interest in the firearms, to give plaintiff some additional notice about the Safe Storage Act. Plaintiff concedes she was given due process when the firearms were seized in October 2016. She and her husband had advance notice of the confiscation of their firearms. They knew who took them and why. They had a receipt listing every weapon confiscated. And, they knew whom to contact for the return of their firearms. Due process demanded no more.

The reason defendants had confiscated the firearms had not changed. Mr. Bennett was still a convicted felon, and a court order and state and federal laws continued to prohibit his possession of firearms. Cf. Panzella v. Sposato, 863 F.3d 210, 217 (2d Cir. 2017) (finding due process required a post-deprivation hearing regarding the return of plaintiff's long guns after the temporary order of protection against her was dismissed). Plaintiff's newly asserted ownership interest did not outweigh the criminal statutes prohibiting her husband's possession of the firearms or call for their immediate return. See Prop. Clerk of Police Dep't of City of New York v. Harris, 9 N.Y.3d 237, 249 (2007) ("The authority of the government to confiscate property even if that property is owned in whole or part by an innocent owner is well settled.").

Due process certainly did not require defendants, upon learning of plaintiff's ownership interest in the firearms, to explain to plaintiff how she could comply with the Safe Storage Act in order to recover her firearms. The Supreme Court has held law enforcement officers have no duty to provide instruction on remedial procedures under state law, like filing a motion to recover seized property. City of W. Covina v. Perkins, 525 U.S. at 241. While the Safe Storage Act is a statute, not a remedial procedure, the same rationale applies here. The Safe Storage Act is a published and readily available state law, and plaintiff is charged with knowledge of that law. Indeed, plaintiff, a certified NRA safety instructor, could have turned to any number of sources to educate herself about the law. She could have looked up state gun laws online, asked fellow gun owners, consulted the NRA's website, spoken to her husband's criminal defense attorney, or, as she ultimately did, engage her own attorney. In fact, when plaintiff finally complied with the Safe Storage Act, the Sheriff's Office promptly inspected her safe and provided for the return of her firearms.

Accordingly, defendants are entitled to summary judgment on plaintiff's Fourteenth Amendment procedural due process claim, and plaintiff's cross-motion is denied.

IV. Monell Claim

As plaintiff has not adequately demonstrated an underlying violation of her constitutional rights, her claim pursuant to Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978), is dismissed. See Segal v. City of New York, 459 F.3d 207, 219 (2d Cir. 2006).

CONCLUSION

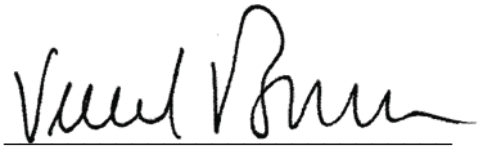
Defendants' motion for summary judgment is GRANTED.

Plaintiff's cross-motion for summary judgment is DENIED.

The Clerk is instructed to terminate the motions (Docs. ##31, 37) and close this case.

Dated: July 8, 2019
White Plains, NY

SO ORDERED:



Vincent L. Briccetti
United States District Judge

SPAIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

CLARISSE BENNETT,

Plaintiff,

-against-

DUTCEHSS COUNTY, NEW YORK; DETECTIVE FRANK LETIZIA; SHERIFF ADRIAN "BUTCH" ANDERSON; and DETECTIVE JAMES DANIELS,

Defendants.

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17 **CIVIL** 7516 (VB)

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated July 8, 2019, Defendants' motion for summary judgment is granted; Plaintiff's cross motion for summary judgment is denied; accordingly, the case is closed.

Dated: New York, New York
July 8, 2019

RUBY J. KRAJICK
Clerk of Court

BY:
Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 7/8/2019