

20-86

United States Court of Appeals
for the
Second Circuit

Victor Juzumas,

Plaintiff - Appellant,

v.

Nassau County, New York,

Defendant - Appellee,

"John Does 1-5",

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

JARED A. KASSCHAU
Nassau County Attorney
Attorney for Defendant-Appellee
One West Street
Mineola, NY 11501
(516) 571-3954

Of Counsel:
Robert F. Van der Waag
Deputy County Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

PRELIMINARY STATEMENT.....1

Concise Statement of Relevant Facts.....1

THE DECISION.....5

NO OPPOSITION TO TWO CLAIMS.....6

SUMMARY OF ARGUMENT.....7

**DEFENDANT’S ENFORCEMENT OF NEW YORK PENAL LAW
§ 400.00(11) WITH REGARD TO PLAINTIFF’S LONGARMS
DID NOT VIOLATE PLAINTIFF’S CONSTITUTIONAL RIGHTS.....7**

**SINCE PLAINTIFF GAVE AWAY HIS LONGARMS, DEFENDANT
DID NOT DEPRIVE HIM OF PROPERTY IN VIOLATION OF THE
FOURTEENTH AMENDMENT.....15**

**SINCE PLAINTIFF GAVE AWAY HIS LONGARMS,
DEFENDANT DID NOT SEIZE HIS PROPERTY IN
VIOLATION OF THE FOURTH AMENDMENT.....17**

**PLAINTIFF’S SECOND AMENDMENT CLAIM WAS
PROPERLY DISMISSED.....18**

THERE IS NO BASIS FOR A MONELL CLAIM.....20

THERE IS NO PREEMPTION.....21

SUMMARY.....22

CONCLUSION.....23

CERTIFICATE OF COMPLIANCE.....24

TABLE OF AUTHORITIES

CASES

Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).....15
District of Columbia v. Heller, 554 U.S. 570 (2008).....18, 19
Garcha v. City of Beacon, 351 F.Supp.2d 213 (S.D.N.Y.2005).....18
Kachalsky v. Cacace, 701 F.3d 81 (2d Cir. 2012).....19
Mapp v. Ohio, 367 U.S. 643 (1961).....17
Matter of Kelly v. Klein, 96 A.D.3d 846 (2d Dept. 2012).....19
McDonald v. Chicago, 561 U.S. 742 (2010).....18, 19
Monell v. Dept. of Social Services of City of New York, 436 U.S. 658 (1978)..20, 21
Mongiolo v. Cuomo, 49 Misc.3d 362 (3d Dept. 2013).....19, 20
People v. Davis, 132 N.Y.3d 17 (2009).....20
People v. Hughes, 83 A.D.3d 960 (2d Dept. 2011).....19
People v. Perkins, 62 A.D.3d 1160 (3d Dept. 2009).....19
Vaher v. Town of Orangetown, N.Y., 916 F.Supp.2d 404 (S.D.N.Y. 2013).....18

UNITED STATES CONSTITUTION

U.S. Const. amend. II.....18
 U.S. Const. amend IV.....17
 U.S. Const. amend. XIV.....15

FEDERAL STATUTES

18 U.S.C. § 371.....3, 12
 21 U.S.C. § 963.....2, 11
 42 U.S.C. § 1983.....15, 17

NEW YORK STATE STATUTES

Mental Hygiene Law § 9.46.....13
 New York State Penal Law § 265.00(17).....13
 New York State Penal Law § 265.20(f).....9
 New York Penal Law § 400.00.....*passim*
 New York Penal Law § 400.00(1).....4, 8
 New York Penal Law § 400.00(1)(b).....9
 New York Penal Law § 400.00(1)(c).....9
 New York Penal Law § 400.00(1)(n).....9, 10, 12
 New York Penal Law § 400.00(11).....*passim*
 New York Penal Law § 400.00(11)(a).....*passim*
 New York Penal Law § 400.00(11)(b).....8, 22
 New York Penal Law § 400.00(11)(c).....*passim*
 New York State Criminal Procedure Law § 530.14.....9, 13
 New York State Family Court Act§ 842-a.....9, 13

OTHER

Nassau County Administrative Code § 8.22.0.....10
Nassau County Police Department Pistol License Section Handbook,
Chapter 2, Section 1.....2-3, 11
NCPD Department Procedure OPS 10023.....11, 14
Secure Ammunition and Firearms Enforcement Act (“SAFE Act”).....*passim*

PRELIMINARY STATEMENT

This Brief is submitted on behalf of Defendant-Appellees, Nassau County, N.Y. and John Does 1-5 for the affirming of the Memorandum and Decision of the United States District Court for the Eastern District of New York (Donnelly, J.) dated September 30, 2019 (SPA-1) which denied Plaintiff's motion and dismissed most of his complaint. The order also granted Plaintiff's cross-motion as to two of his claims and referred those claims to the U.S. Magistrate where they were settled, and those claims dismissed with prejudiced.

Concise Statement of Relevant Facts

For a complete recitation of the material facts, the Court is respectfully referred to Defendant's Statement of Undisputed Material Facts pursuant to Local Rule 56.1 ("56.1, ¶ __"), (A60). the Declaration of Ralph J. Reissman and the exhibits annexed thereto, and to the affidavit of Nassau County Lieutenant Marc Timpano ("Timpano Aff.") (A-30 et seq.).

Plaintiff was born July 11, 1961. 56.1, ¶ 1. Plaintiff resides in Merrick, New York within the County of Nassau. *Id.*, ¶ 2. Plaintiff is a customs house broker operating under the corporate name of "Victor J. Juzumas, CHB, Inc." *Id.*, ¶ 3.

When plaintiff and his family moved to Merrick, plaintiff obtained a pistol license from the Nassau County Police Department. Plaintiff's pistol license was

issued by the Nassau County Police Department's Pistol License Section on January 23, 2003. At the time plaintiff had his pistol license he owned two pistols, a Ruger .22 caliber and a CZ .40 caliber, and used the pistols for target shooting. At the time plaintiff had his pistol license, he also owned two shotguns and four rifles (collectively referred to as "longarms"), which he used for target shooting, and also for hunting deer and turkey in upstate New York. *Id.*, ¶¶ 4-7.

On May 28, 2008 plaintiff was arrested at his home by Detective Derrick Bottari ("Bottari") of the United States Drug Enforcement Agency ("DEA") for Conspiracy to Import Controlled Substances, in violation of 21 U.S.C. § 963. *Id.*, ¶ 8.

The DEA, with the assistance of a confidential informant, acquired audio tape of plaintiff agreeing to import Ecstasy, a Schedule 1 controlled substance, into the United States from China. However, due to an earthquake that struck Asia, the delivery was not completed. *Id.*, ¶ 9.

On May 28, 2008 Bottari confiscated plaintiff's pistol license and his two pistols. Over one week later, DEA agents came to plaintiff's home and confiscated his rifles and shotguns. *Id.*, ¶¶ 10-11.

On September 11, 2008 the Pistol License Section suspended plaintiff's pistol license due to his arrest on May 28 by the DEA for Conspiracy to Import Controlled Substances. The suspension was imposed in accordance with Chapter 2, Section 1

of the Nassau County Police Department Pistol License Section Handbook, which provides *in pertinent part*:

The police of the Nassau County Police Department is to *immediately suspend* the pistol license of any licensee who violates any of the terms and conditions of the license or this Handbook and commence an investigation to determine whether or not the license should be revoked. Violations of the terms and conditions of the pistol license include, but are not limited to:

Arrest, indictment, issuance of a field appearance ticket, being named as respondent in a proceeding for the issuance of an Order of Protection or a Temporary Order of Protection, or any conviction, other than a traffic summons, in any jurisdiction.

Id., ¶ 12.

Six to eight weeks after May 28, 2008, Bottari returned plaintiff's rifles and shotguns to him, and plaintiff packed them up and stored them in his mother-in-law's attic next door to his house in Merrick. *Id.*, ¶ 13.

On June 15, 2012 plaintiff pled guilty to 18 U.S.C. § 371, Conspiracy to Violate Customs Arrival, Reporting, Entry and Clearance Requirements, and was assessed a penalty of \$25.00 in lieu of incarceration and/or probation. *Id.*, ¶ 14.

On November 4, 2015 the Pistol License Section revoked plaintiff's pistol license based on his arrest history, his conviction of violation of 18 U.S.C. § 371, and his lack of good moral character via written correspondence (the "Revocation Notice"). The Revocation Notice included the following provision: "As directed by New York State Penal Law section 400, and the New York State Secure Ammunitions and Firearms Enforcement Act, you are prohibited from possessing

firearms, rifles, shotguns.” Therefore, pursuant to New York State statute, since plaintiff’s pistol license was revoked, he was prohibited from possessing firearms, rifles and shotguns at the time of revocation and therefore was required to surrender all of his firearm, rifles and shotguns to the Pistol License Section. *Id.*, ¶¶ 15-17.

New York Penal Law § 400.00, “Licenses to carry, possess, repair and dispose of firearms,” provides at § 400.00(11):

11. License: revocation and suspension. (a) The conviction of a licensee anywhere of a felony or serious offense or a licensee at any time becoming ineligible to obtain a license under this section shall operate as a revocation of the license. A license may be revoked or suspended as provided for in section 530.14 of the criminal procedure law or section eight hundred forty-two-a of the family court act. Except for a license issued pursuant to section 400.01 of this article¹, **a license may be revoked and cancelled at any time in the city of New York, and in the counties of Nassau and Suffolk, by the licensing officer**, and elsewhere than in the city of New York by any judge or justice of a court of record; a license issued pursuant to section 400.01 of this article may be revoked and cancelled at any time by the licensing officer or any judge or justice of a court of record. The official revoking a license shall give written notice thereof without unnecessary delay to the executive department, division of state police, Albany, and shall also notify immediately the duly constituted police authorities of the locality. (Emphasis added.)

(b) Whenever the director of community services or his or her designee makes a report pursuant to section 9.46 of the mental hygiene law, the division of criminal justice services shall convey such information, whenever it determines that the person named in the report possesses a

¹ Penal Law § 400.00(1) is entitled, “License to carry and possess firearms for retired sworn members of the division of state police.”

license issued pursuant to this section, to the appropriate licensing official, who shall issue an order suspending or revoking such license.

(c) In any instance in which a person's license is suspended or revoked under paragraph (a) or (b) of this subdivision, such person shall surrender such license to the appropriate licensing official and any and all firearms, rifles, or shotguns owned or possessed by such person shall be surrendered to an appropriate law enforcement agency as provided in subparagraph (f) of paragraph one of subdivision a of section 265.20 of this chapter. In the event such license, firearm, shotgun, or rifle is not surrendered, such items shall be removed and declared a nuisance and any police officer or peace officer acting pursuant to his or her special duties is authorized to remove any and all such weapons. (Emphasis added.)

Upon receiving the Revocation Notice plaintiff consulted with his brother, an attorney, who advised plaintiff to get rid of the longarms. Weeks after receiving the Revocation Notice, plaintiff gave two of his longarms to his son-in-law, two to a hunting buddy from upstate New York, and two to a friend. Plaintiff did not receive any compensation for giving away his longarms. 56.1, ¶¶ 19-20.

Plaintiff commenced this action by filing his Complaint on May 21, 2017. *Id.*, ¶ 21. Defendant filed its Answer to the Complaint on August 21, 2017. *Id.*, ¶ 22.

THE DECISION

Based upon the forgoing the District Court rendered a concise and complete decision which granted so much of plaintiff's cross motion for 14th Amendment procedural Due Process claim and related Monell which the Judge transferred to the

Magistrate. Those claims, although disputed by the Defendant were settled and dismissed with prejudice. (SPA- 19-20; Index #43))

There are, therefore, no challenges to the appealed order by the Defendant.

Plaintiff's Appellant's Claims

Plaintiff limits his appeal arguments in his brief to the following:

- The Court misinterpreted Penal Law 400.00(11);
- Court Erred by Dismissing his 4th Amendment claim;
- Court Erred by Dismissing Second Amendment;
- Monell Should not have been dismissed.
- The State Preempted the County

These are claims disrobed in the original complaint except those settled as noted above and those abandoned by Plaintiff; and, preemption was not alleged nor argued before the Court.

NO OPPOSITION TO TWO CLAIMS

At the outset, it is important to note that in opposing defendant's motion, plaintiff's Memorandum of Law in opposition to defendant's motion for summary judgment, and in support of his cross-motion for summary judgment failed to oppose those parts of defendant's motion which address plaintiff's fourth cause of action, for alleged violation of the First Amendment, and also plaintiff's sixth cause of action for "acting in concert." As the Trial Court noted he abandoned those claim (SPA-9). Therefore, defendant's motion for summary judgment was properly granted as to those two causes of action since plaintiff had not opposed these parts of defendant's motion. The District Court Judge recognized that abandonment.

This brief will show how each claim, whether abandoned or otherwise, laced any merit as properly found by the District Court.

SUMMARY OF ARGUMENT

There are no violations of plaintiff's Constitutional rights. The complaint is clearly insufficient.

The interpretation of the relevant Penal Law provisions by plaintiff is wrong, illogical as recognized explained and held by the District Court. All his claims emanate from an illogical interpretation of the pertinent statutory requisites, He basis his damage on wrong assertions that the Police Commissioner can't do what he did regarding his pistol license and thereby the Commissioner is interfering in his absolute right to his guns, pistils and longarms. He then must claim that although the police did not seize his weapons, they were constructively taken because what was about to happen.

With this twisted and extreme theory of seizure he claims basic constitutional violation. The claims within the complaint are totally unsupported by the facts, events and the many historic legal decisions.

DEFENDANT'S ENFORCEMENT OF NEW YORK PENAL LAW § 400.00(11) WITH REGARD TO PLAINTIFF'S LONGARMS DID NOT VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS

In his original Memorandum of Law and now his brief herein plaintiff argues that Penal Law § 400.00(11) "has no application to him." Pl. Mem., 1. (A-91). He claims that "Under only a narrow set of circumstances does § 400.00(11) require the

revocation of a pistol license and the concomitant surrender of rifles and shotguns (“longarms”).” However, as explained below, Penal Law § 400.00(11) cannot be read in such a limited way as to nullify the enforcement of § 400.00(11)(c) which does in fact direct that when a pistol license is revoked, the license owner must surrender all longarms as well. Plaintiff would therefore nullify § 400.00(11)(c) from having any relation to § 400.00(11)(a) and (b), which is not what the New York State Legislature intended in enacting the Secure Ammunition and Firearms Enforcement Act (“SAFE Act”) in 2013.

Instead, as explained in the Affidavit of Lt. Marc Timpano (A- 30 et seq) in opposition to plaintiff’s cross-motion, § 400.00(11)(c) clearly prohibits one whose pistol license was suspended or revoked from owning longarms *at the time the license is suspended or revoked*, subject to a subsequent investigation by the Nassau County Police Department (“NCPD”) as to whether and when the owner may again possess longarms. Subsequently, the NCPD conducts an investigation into restoring confiscated longarms, separate and apart from an investigation into restoration of pistol licenses.

New York State Penal Law § 400.00 provides the Commissioner of Police of defendant Nassau County the exclusive authority to issue pistol licenses within the County upon satisfactory evidence that an applicant satisfies the eligibility requirements established by Penal Law § 400.00(1), which includes a showing that an applicant is of good moral character and has not been convicted of a felony or

serious offenses, *inter alia*, and concerning whom no good cause exists for the denial of a license. Penal Law §§ 400.00(1)(b), (c), (n).

NCPD's Pistol License Section is responsible for the issuance, suspension, revocation, and regulation of pistol licenses throughout the County. Pursuant to Penal Law § 400.00(11)(a), an individual's pistol license is automatically revoked if the licensee is convicted of a felony or serious offense, or if the licensee at any time becomes ineligible to obtain a license under § 400.00. A pistol license can also be revoked or suspended as provided for in § 530.14 of the New York State Criminal Procedure Law ("CPL") or § 842-a of the New York State Family Court Act ("FCA"). Penal Law § 400.00(11)(a).

In the County of Nassau, the Commissioner of Police can revoke or cancel a pistol license at any time. Penal Law § 400.00(11)(a). He can also suspend and/or revoke a pistol license based upon evidence of any disqualification pursuant to the NCPD Pistol License Section Handbook or applicable law.

In New York State, there is no license requirement for a resident to own a rifle or a shotgun, commonly referred to as "longarms" or "long guns." However, pursuant to Penal Law § 400.00(11)(c), a pistol licensee whose license has been suspended or revoked under Penal Law § 400.00(11)(a) must surrender any and all firearms and long guns to the Pistol License Section in accordance with Penal Law § 265.20(f). Penal Law § 400.00(11)(c). Requiring a pistol licensee to surrender of all his or her firearms and longarms after a revocation under NYSPL § 400.00(11)(a)

complies with Nassau County Administrative Code § 8.22.0 – “Duties of the Police Department,” which states that it is the duty of the NCPD to preserve public peace, prevent crime, protect the rights of persons and property, and guard public health.

Pursuant to this section, when NCPD determines that a threat to public safety exists arising out of a pistol licensee’s possession of long guns, the licensee is required to surrender his firearms and long guns to the Pistol License Section. Such a threat constitutes “good cause,” rendering a licensee ineligible for a pistol license pursuant to Penal Law § 400.00(1)(n) and warrants revocation of the licensee’s pistol license pursuant to Penal Law § 400.00(11)(a). A revocation based on ineligibility requires a pistol licensee to surrender any and all firearms and long guns to the Pistol License Section. Penal Law § 400.00(11)(c).

When a pistol licensee has his or her license revoked under § 400.00(11)(a), he or she is advised by the Pistol License Section that pursuant to the Penal Law and the SAFE Act, the licensee is prohibited from possessing firearms and long guns. This notification fulfills the intent of Penal Law § 400.00(11)(a), whereby a pistol licensee is prohibited from possessing firearms and long guns at the time of revocation and therefore must surrender any and all firearms and long guns to the Pistol License Section.

A pistol licensee who has surrendered his or her long guns to the Pistol License Section after being revoked under Penal Law § 400.00(11)(a) is entitled for a review by NCPD to determine if his or her long guns should be returned. Pursuant

to NCPD Department Procedure OPS 10023, a copy of which is annexed hereto as Appendix “A,” NCPD reviews all incidents involving the surrender of long guns as soon as possible. NCPD initiates an administrative review to determine if a legal impediment exists prohibiting the return of the surrendered long guns. If no such impediment exists, NCPD notifies the licensee that he or she can arrange for the return of his or her long guns. If no legal impediment exists, NCPD does not automatically prohibit a licensee from possessing long guns even if his or her pistol license is revoked.

In this case, plaintiff’s pistol license was issued by the NCPD Commissioner of Police on January 23, 2003. On May 28, 2008, plaintiff was arrested at his home By Detective Derrick Bottari (“Det. Bottari”) of the United States Drug Enforcement Agency (“DEA”) and charged with Conspiracy to Import Controlled Substances, in violation of 21 U.S.C. § 963. Det. Bottari confiscated plaintiff’s pistol license and his two (2) pistols at the time of arrest.

On September 11, 2008 the Pistol License Section suspended plaintiff’s pistol license due to his arrest on May 28, 2008 by the DEA for Conspiracy to Import Controlled Substances. The suspension was imposed in accordance with Chapter 2, Section 1 of the Nassau County Police Department Pistol License Section Handbook, which provides, *in pertinent part*:

The policy of the Nassau County Police Department is to *immediately suspend* the pistol license of any licensee who violates any of the terms and conditions of the license or this Handbook and commence an investigation to

determine whether or not the license should be revoked. Violations of the terms and conditions of the pistol license include, but are not limited to:

- b. Arrest, indictment, issuance of a field appearance ticket, being named as respondent is a proceeding for the issuance of an Order of Protection or a Temporary Order of Protection, or any conviction, other than a traffic summons, in any jurisdiction[.]

On June 15, 2012, plaintiff pleaded guilty to 18 U.S.C. § 371 and was assessed a penalty of \$25.00 in lieu of incarceration and/or probation. On November 4, 2015 the Pistol License Section revoked plaintiff's pistol license based on his arrest history, his conviction of 18 U.S.C. § 371, and his lack of good moral character via written correspondence (the "Revocation Notice"). These factors established "good cause" to render plaintiff ineligible for a pistol license pursuant to Penal Law § 400.00(1)(n).

The Revocation Notice included the following provision: "As directed by New York State Penal Law section 400, and the New York State Secure Ammunitions and Firearms Enforcement Act, you are prohibited from possessing firearms, rifles, and shotguns." Therefore, pursuant to New York State statute, since plaintiff's pistol license was revoked, he was prohibited from possessing firearms and long guns at the time of revocation, and therefore was required to surrender all of his firearms and long guns to the Pistol License Section.

Pursuant to New York State and federal law, plaintiff would be prohibited from possessing long guns for as long as a legal impediment existed prohibiting such

possession. If no such impediment existed, NCPD would not automatically prohibit plaintiff from possessing long guns even if his pistol license was still revoked, as possession of a pistol license and possession of long guns are subject to two (2) separate determinations based upon two (2) distinct standards of review.

Plaintiff argues that the only precipitating events justifying the prohibition of owning longarms after a pistol license has been revoked are conviction of a felony or “serious offense,” as that terms is defined by Penal Law § 265.00(17); the issuance of an Order of Protection pursuant to §530.14 of the Criminal Procedure Law; the issuance of an Order of Protection pursuant to §842-a of the Family Court Act; and/or notification made of the licensee pursuant to § 9.46 of the Mental Hygiene Law. Pl. Mem., 4-5.

This is simply wrong. As explained above, Penal Law § 400.00(11)(a) and (b) must be read in conjunction with § 400.00(11)(c), considering New York State’s enactment of the SAFE Act to protect the public from gun violence. There is nothing unconstitutional in Nassau County’s enforcement of New York State law, specifically, Penal Law § 400.00(11) taken in its entirety, contrary to plaintiff’s assertion that “Nassau County was not acting pursuant to Penal Law § 400.00(11), but according to its own unconstitutional customs and policies.” Pl. Mem., 15. In addition, plaintiff wrongly asserts that “a handgun licensee does not have the opportunity to have a hearing to seek the return of their longarms until after their pistol license is revoked.” Pl. Mem., 15-16. To the contrary, as explained above,

Nassau County's policy is that plaintiff would be prohibited from possessing long guns for as long as a legal impediment existed prohibiting such possession. If no such impediment existed, NCPD would not automatically prohibit plaintiff from possessing long guns even if his pistol license was still revoked, as possession of a pistol license and possession of long guns are subject to two (2) separate determinations based upon two (2) distinct standards of review. *See* Appendix "A," OPS 10023. Thus, plaintiff's claim argument that "under the County's policy, the licensee would only be able to lawfully possess long guns *after* they reapplied for, and were issued another pistol license," Pl. Mem., 16 is false.(A- 91). Therefore, plaintiff's Fourteenth Amendment claim for violation of due process must be dismissed on summary judgment.

Finally, addressing plaintiff's Fourth Amendment claim that "The moving force behind [his] loss of possession of his longarms was state action," namely, "Nassau County's requirement that he get rid of his longarms or be subject to criminal penalties and prosecution," Pl. Mem., 15, in issuing the Revocation Letter, Nassau County simply informed plaintiff of his legal status under the statutory framework of Penal Law § 400.00(11). That is, under § 400.00(11)(c), once his pistol license was revoked, plaintiff could choose to divest himself of his longarms or face criminal prosecution. There is nothing unconstitutional in Nassau County's informing plaintiff of his legal options under § 400.00(11), or in enforcing a constitutional statute. Plaintiff made his choice. The only "moving force" was §

400.00(11), which plaintiff has not challenged as being unconstitutional. Nassau County's enforcement of a constitutional statute was itself constitutional and did not violate Plaintiff's constitutional rights.

**SINCE PLAINTIFF GAVE AWAY HIS LONGARMS,
DEFENDANT DID NOT DEPRIVE HIM OF PROPERTY IN VIOLATION
OF THE FOURTEENTH AMENDMENT**

Plaintiff's first cause of action is for violation of his "Constitutional Right to Due Process as guaranteed by the Fourteenth Amendment, 42 U.S.C. § 1983." Complaint, ¶ 36. The Fourteenth Amendment provides, in relevant part:

Section 1.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV. "Property interests, of course, are not created by the Constitution. Rather they are created, and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law ..." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

Plaintiff's claim under Section 1983 for deprivation of property without due process in violation of the Fourteenth Amendment fails because no employee or agent of defendant Nassau County deprived him of any property; rather, *he gave away* his longarms to a relative and friends. In this case, defendant *never seized* plaintiff's longarms, rather, his own deposition testimony establishes beyond doubt that he simply gave them away:

Q: Now, after your – after you were informed that your pistol license was revoked, what did you do with your long guns? Ex.

A, 28:23-29:2.

A: I gave two of the rifles to my now son-in-law. I gave two of them to my hunting buddy from upstate in Bovina and two went to a friend. *Id.*, 29:10-12.

Q: When you gave the rifles to your son-in-law, did you – did he pay you for them?

A: No.

Q: When you gave the two rifles to your hunting buddy –

A. No.

Q: No pay?

A: No pay. Life goes on. And you – I'm trying to rebuild life and trying to build a business. I was told to get rid of the rifles. I got rid of the rifles. Because at the time that was not a priority for me. You have to get rid of them, you get rid of them.

Q: And to the friend, did he pay you for those?

A: No. I took no money.

Ex. A, plaintiff's deposition transcript, pp. 29:16-30:9.

In this case, since plaintiff gave away his firearms, defendant did not deprive him of his property without due process of law in violation of the Fourteenth

Amendment. No employee or agent of defendant Nassau County ever seized plaintiff's longarms. Therefore, plaintiff's first cause of action, asserted under the Fourteenth Amendment, should be dismissed.

**SINCE PLAINTIFF GAVE AWAY HIS LONGARMS,
DEFENDANT DID NOT SEIZE HIS PROPERTY IN
VIOLATION OF THE FOURTH AMENDMENT**

Plaintiff's second cause of action is asserted under the Fourth Amendment: "[D]efendant is liable to plaintiff for violations of his Constitutional Rights as guaranteed by the Fourth Amendment, 42 U.S.C. § 1983." Complaint, ¶ 38.

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The Fourth Amendment is enforceable against the states via the Fourteenth Amendment. *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

This is really a claim for constructive possession without any invasion of property. There has never been such a legal holding and accordingly, as mentioned by the District Judge there are no cases to hold such an incredible claim (SPA-14). Plaintiff simply gave away his longarms, and no employee or agent of defendant Nassau County ever seized his longarms, there was no unlawful seizure in violation of the Fourth Amendment. Thus, plaintiff's second cause of action should be dismissed.

PLAINTIFF’S SECOND AMENDMENT CLAIM WAS PROPERLY DISMISSED

For plaintiff’s third cause of action, the Complaint alleges that “defendant is liable to plaintiff for violations of this Constitutional Rights as guaranteed by the Second Amendment. Complaint, ¶ 40. The Second Amendment provides: “A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. In District of Columbia v. Heller, the Supreme Court held that the Second Amendment “codified a pre-existing right” that includes an “individual right to possess and carry weapons in case of confrontation.” 554 U.S. 570, 592 (2008). In McDonald v. Chicago, the Supreme Court held for the first time that the Second Amendment’s protections apply fully to the states through the Due Process Clause of the Fourteenth Amendment. 561 U.S. 742, 791 (2010). While recognizing that the Second Amendment encompasses an individual right, the Supreme Court also made clear that the Second Amendment is not unlimited, and does not protect a right “to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” Heller, 554 U.S. at 626. Within the Second Circuit, courts have also noted that existing case law “indicates that the right to bear arms is not a right to hold some particular gun.” Vaher v. Town of Orangetown, N.Y., 916 F.Supp.2d 404, 429 (S.D.N.Y. 2013) (citing Garcha v. City of Beacon, 351 F.Supp.2d 213, 217 (S.D.N.Y.2005)) (quotation marks omitted).

To the extent that plaintiff challenges Penal Law § 400.00(11)(c) as an unconstitutional restraint on his right to bear arms under the Second Amendment, his challenge is in actuality to the New York Secure Ammunition and Firearms Enforcement Act (“SAFE Act”) enacted by the New York State Legislature on January 16, 2013. The SAFE Act amended Penal Law § 400.00(11) to include the prohibition of ownership of longarms by individuals whose pistol license were suspended or revoked. Prior challenges to New York State’s regulation of firearms have been uniformly rejected by the courts.

For example, following the Supreme Court’s decisions in *Heller* and *McDonald*, the Second Circuit held that Penal Law § 400.00 does not violate the Second Amendment by requiring an applicant to demonstrate “proper cause” to obtain a license to carry a concealed handgun in public (*Kachalsky v. Cacace*, 701 F.3d 81, 101 (2d Cir. 2012)); *accord Matter of Kelly v. Klein*, 96 A.D.3d 846 (2d Dept. 2012). Further, in *People v. Perkins*, 62 A.D.3d 1160 (3d Dept. 2009), the Appellate Division, Third Department rejected a Second Amendment challenge to Penal Law article 265, which criminalizes the possession of firearms under certain circumstances (*accord People v. Hughes*, 83 A.D.3d 960 (2d Dept. 2011)).

In *Mongiello v. Cuomo*, 49 Misc.3d 362 (3d Dept. 2013) the plaintiffs’ Complaint was directed generally at the State’s authority to regulate the sale, possession and use of firearms and ammunition. The Appellate Division, Third Department rejected plaintiffs’ claim that the State’s firearms laws suffer from

“wholesale constitutional impairment”, citing *People v. Davis*, 132 N.Y.3d 17, 23-23 (2009) (“Duly enacted statutes enjoy a presumption of constitutionality [and] a party who asserts that a statute is facially unconstitutional must demonstrate beyond a reasonable doubt that the statute suffers from wholesale constitutional impairment”) (internal citations and quotation marks omitted.) The court further held that as plaintiffs could not demonstrate that the SAFE Act was unconstitutional in all respects and under all applications, the Complaint had to be dismissed for failure to state a cause of action. *Mongiolo*, 49 Misc.3d at 366.

While plaintiff Juzumas’s Complaint in this action does not expressly challenge the constitutionality of Penal Law § 400.00(11)(c), that is the essence of his Second Amendment claim. Neither the SAFE Act nor § 400.00(11)(c) suffer from “wholesale constitutional impairment.” The Nassau County Police Department policy of adhering to the SAFE Act and § 400.00(11)(c) is constitutional and thus, plaintiff’s third cause of action for claimed violation of his Second Amendment rights should be dismissed.

THERE IS NO BASIS FOR A MONELL CLAIM

Plaintiff’s fifth cause of action is asserted “Under the theory that, by creating, maintaining, enforcing and/or applying the unconstitutional policy,” defendant is liable for violations of his Constitutional rights under *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978). Complaint, ¶ 44. However, since plaintiff cannot establish that any policy of Nassau County is unconstitutional,

and cannot establish that Nassau County's decision to follow New York Penal Law § 400.00(11)(c) which, as demonstrated above is not unconstitutional, defendant County cannot be liable under *Monell*. There is no underlying constitutional scheme.

THERE IS NO PREEMPTION

Finally, Plaintiff states that the entire regulation is preempted by State law. No authority is cited. No real argument except the assertion itself is made. And to the contrary, these Penal Law sections and the regulations of the police Commissioner are in keeping with the scheme of the State of New York concerning the protection of its citizens and the rightful authority of the Police Commissioner concerning the privilege to own and possess weapons. This Court, and many others, have clarified the wrongful challenge to the licensing official. The State of New York has had a comprehensive framework for guns of all types and their licensing and regulation. The instant litigation is one of many such areas properly assigned to the Police Commissioner. There is no preemption for the claims made in this litigation. (See Second Amendment point herein, *supra*).

And, most importantly, it is difficult to decipher any "preemption" challenge in the District Court. There is no cause of action articulating a preemption claim. There is no argument before the Judge. Perhaps, Plaintiff is asserting it in his brief as something that is implicated by him in his other claims. In any event, he should not be permitted to specifically claim it now.

SUMMARY

The essence of Plaintiff's real argument is the nullification of § 400.00(11)(c) from having any relation to § 400.00(11)(a) and (b), which is not what the New York State Legislature intended in enacting the Secure Ammunition and Firearms Enforcement Act ("SAFE Act") in 2013. He then weaves into this deception a Second Amendment infringement which, of course, has no support in any authority in our Courts, especially within this Second Circuit.

The District Court Judge saw the fallacy of these claims and disposed of them item by item in a short but complete decision which is supported by unchallenged case law and universal principles.

CONCLUSION

For the forgoing reasons, it is respectfully requested that Plaintiffs-Appellant's appeal be dismissed and the Memorandum and Order of the United States District Court, Eastern District of New York (Donnelly, J.) dated September 30, 2019 be affirmed as to the granting of Defendant's Motion for Summary Judgment together with such other relief as this Court deems just and proper, with costs and disbursements.

Dated: Mineola, New York
August 27, 2020

JARED A. KASSCHAU
Nassau County Attorney
Attorney for Defendant-Appellee

By: s/ Robert F. Van der Waag
Robert F. Van der Waag
Deputy County Attorney
1 West Street
Mineola, New York 11501
(516) 571-3954

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure (“FRAP”) and the Second Circuit’s Local Rule 32.1(a)(4) as it contains 5,450 words, excluding the parts of the brief exempted by FRAP Rule 32(f).

This brief complies with the typeface requirements of FRAP Rule 32(a)(5) and the type style requirements of FRAP Rule 32(a)(6) as it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365’s Times New Roman 14-point font.

Dated: Mineola, New York
August 27, 2020

JARED A. KASSCHAU
Nassau County Attorney
Attorney for Defendant-Appellee

By: s/ Robert F. Van der Waag
Robert F. Van der Waag
Deputy County Attorney
1 West Street
Mineola, New York 11501
(516) 571-3954