

ORIGINAL

SHORT FORM ORDER

INDEX No. 623373/2017
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 3/23/18
SUBMIT DATE 4/26/18
Mot. Seq. # 01 - MD
X-Mot. Seq. # 02 - MG

-----X
HUNTERS FOR DEER, INC., and MICHAEL LEWIS,

Plaintiffs,

-against-

TOWN OF SMITHTOWN,

Defendant.
-----X

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Upon the following papers numbered 1 - 22 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers 5 - 11; Answering Affidavits and supporting papers 12 - 19; Replying Affidavits and supporting papers 20 - 22; ~~Other~~, (and after hearing counsel in support and opposed to the motion) it is;

The plaintiffs seek an order pursuant to CPLR 3212 granting summary judgment and declaring that the Town of Smithtown's locally enacted law on firearm discharge is illegal in nature. The defendant opposes this application and cross moves for an order granting summary judgment.

CPLR §3212(b) states that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (*Olan v. Farrell Lines, Inc.*, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); *Spearman v. Times Square Stores Corp.*, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, *New York Civil Practice Sec.* 3212.09)).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant

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summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must “show facts sufficient to require a trial of any issue of fact” CPLR3212 [b]; *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (see *S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer*, *supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

The plaintiffs are a not for profit corporation, Hunters for Deer, Inc., and a licensed New York State hunter, Michael Lewis. They claim that “Township, such as the Town of Smithtown, are pre-empted from legislating within the areas of hunting, discharge of a bow and arrow, discharge of an air gun or, with the exception of the Village of Green Island in Albany County, discharge of a firearm.” The plaintiffs claim that Smithtown’s local code section 160 which establishes firearm discharge setbacks and related regulations is illegal.

NY ECL § 11-0931(4) states:

- a. No person shall:
 - (1) discharge a firearm, crossbow or long bow in such a way as will result in the load, bolt, or arrow thereof passing over a public highway or any part thereof;
 - (2) discharge a firearm within five hundred feet, a long bow within one hundred fifty feet, or a crossbow within two hundred fifty feet from a dwelling house, farm building or farm structure actually occupied or used, school building, school playground, public structure, or occupied factory or church;...
- b. The prohibitions contained in subparagraph 2 of paragraph a above shall not apply to:

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(1) The owner or lessee of the dwelling house, or members of his immediate family actually residing therein, or a person in his employ, or the guest of the owner or lessee of the dwelling house acting with the consent of said owner or lessee, provided however, that nothing herein shall be deemed to authorize such persons to discharge a firearm within five hundred feet, a long bow within one hundred fifty feet, or a crossbow within two hundred fifty feet of any other dwelling house, or a farm building or farm structure actually occupied or used, or a school building or playground, public structure, or occupied factory or church.

NY Town § 130 states:

The town board after a public hearing may enact, amend and repeal ordinances, rules and regulations not inconsistent with law, for the following purposes in addition to such other purposes as may be contemplated by the provisions of this chapter or other laws. In order to accomplish the regulation and control of such purposes, the town board may include in any such ordinance, rule or regulation provision for the issuance and revocation of a permit or permits, for the appointment of any town officers or employees to enforce such ordinance, rule or regulation and/or the terms and conditions of any permit issued thereunder, and for the collection of any reasonable uniform fee in connection therewith. The town clerk shall give notice of such hearing by the publication of a notice in at least one newspaper circulating in the town, specifying the time when and the place where such hearing will be held, and in general terms describing the proposed ordinance. Such notice shall be published once at least ten days prior to the day specified for such hearing...

27. Firearms. In the towns of...**Smithtown**... prohibiting the discharge of firearms in areas in which such activity may be hazardous to the general public or nearby residents, and providing for the posting of such areas with signs giving notice of such regulations, **which ordinances, rules and regulations may be more, but not less, restrictive than any other provision of law.** Thirty days prior to the adoption of any ordinance changing the five hundred foot rule, a notice must be sent to the regional supervisor of fish and game of the environmental conservation department, notifying him of such intention. (Emphasis added).

Smithtown Town Code Chapter 160 states:

§ 160-2. Definitions. The following definitions shall govern the interpretation of this chapter unless otherwise expressly defined herein: FIREARM — Includes a weapon which acts by the force of gunpowder or from which a shot is

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discharged by the force of an explosion, as well as an air rifle, an air gun, a BB gun, a slingshot and a bow and arrow.

§ 160-3. Purpose. The purpose of this chapter is to prohibit any person from discharging a firearm in those areas of the Town of Smithtown in which such activity may be hazardous to the general public or nearby residents.

§ 160-4. Prohibited areas. The discharge of firearms is deemed hazardous to the general public and, therefore, prohibited in all areas of the Town of Smithtown except those areas as stipulated under § 160-5, Exceptions.

§ 160-5. Exceptions. Firearms may be discharged upon one's own property and upon the property of another with the written consent of the landowner, provided that any such discharge of firearms does not occur within 500 feet from a dwelling, school or occupied structure, or a park, beach, playground or any other place of outdoor recreational or nonrecreational activities; and further provided that any such discharge of firearms does not violate the provisions of the New York State Environmental Conservation Law.

In *Matter of Chwick v Mulvey*, 81 AD3d 161[2d Dept 2010], the court discussed both conflict preemption and field preemption. The court outlined conflict preemption and stated that

Under the doctrine of conflict preemption, a local law is preempted by a state law when a "right or benefit is expressly given . . . by . . . State law which has then been curtailed or taken away by the local law" (*Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91, 97, 518 NE2d 903, 524 NYS2d 8 [1987]; see *New York State Club Assn. v City of New York*, 69 NY2d at 217; *Matter of Cohen v Board of Appeals of Vil. of Saddle Rock*, 100 NY2d at 400; *DJL Rest. Corp. v City of New York*, 96 NY2d at 95). Put differently, conflict preemption occurs when a local law prohibits what a state law explicitly allows, or when a state law prohibits what a local law explicitly allows (see *Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs*, 74 NY2d 761, 762-763, 543 NE2d 725, 545 NYS2d 82 [1989] [City of New York ordinance that required cabarets to close between the hours of 4:00 a.m. and 8:00 a.m. was preempted, as it conflicted with state law that allowed patrons to remain on the premises consuming alcoholic beverages until 4:30 a.m.]; *Wholesale Laundry Bd. of Trade v City of New York*, 17 AD2d 327, 234 NYS2d 862 [1962], affd for reasons stated below 12 NY2d 998, 189 NE2d 623, 239 NYS2d 128 [1963] [local ordinance that provided for a different minimum wage than state law was preempted, as it conflicted with state minimum wage law]). In determining the applicability of conflict preemption, we examine not only the language of the local ordinance and the state statute, but also whether the direct consequences of a local ordinance "render illegal what is specifically allowed by State law" (*Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs*, 74 NY2d at 764, quoting *People v De Jesus*, 54 NY2d

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465, 472, 430 NE2d 1260, 446 NYS2d 207 [1981].

(*Matter of Chwick v Mulvey*, 81 AD3d 161, 167-168). The court also outlined field preemption and stated that

Turning to the doctrine of field preemption, "a local law regulating the same subject matter [as a state law] is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute" (*Albany Area Bldrs. Assn. v Town of Guilderland*, 74 NY2d at 377; see *Matter of Cohen v Board of Appeals of Vil. of Saddle Rock*, 100 NY2d at 401; *DJL Rest. Corp. v City of New York*, 96 NY2d at 95; *Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d at 97-98; *Dougal v County of Suffolk*, 102 AD2d at 532-533; *Matter of Ames v Smoot*, 98 AD2d at 218-219). "Such [local] laws, were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns" (*Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d at 97; see *Albany Area Bldrs. Assn. v Town of Guilderland*, 74 NY2d at 377).

Field preemption applies under any of three different scenarios (see *Consolidated Edison Co. of N.Y. v Town of Red Hook*, 60 NY2d 99, 105, 456 NE2d 487, 468 NYS2d 596 [1983]). First, an express statement in the state statute explicitly avers that it preempts all local laws on the same subject matter (see *DJL Rest. Corp. v City of New York*, 96 NY2d at 95). Second, a declaration of state policy evinces the intent of the Legislature to preempt local laws on the same subject matter (see *Robin v Incorporated Vil. of Hempstead*, 30 NY2d 347, 350, 285 NE2d 285, 334 NYS2d 129 [1972]). And third, the Legislature's enactment of a comprehensive and detailed regulatory scheme in an area in controversy is deemed to demonstrate an intent to preempt local laws (see *New York State Club Assn. v City of New York*, 69 NY2d at 217; *People v De Jesus*, 54 NY2d at 468-469).

(*Matter of Chwick v Mulvey*, 81 AD3d 161, 169-170 [2d Dept 2010].)

The plaintiffs argue that the ECL law "vests the Department of Environmental Conservation (DEC) with the authority to promulgate rules and regulations to carry out the purposes of the ECL." Plaintiffs further argue that the "outer boundary of applicable 'home rule authority' can be approximated as where the state 'has demonstrated its intent to preempt an entire field and thereby preclude any further local regulation.'"

Here the state has not preempted the entire field for regulations related to firearm discharge as evinced by NY Town § 130. This section specifically allows the Town of Smithtown, among several other towns to enact laws related to firearm discharge when "such activity may be hazardous to the general public

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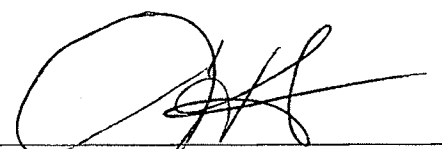
or nearby residents” and allows for those laws to “be more, but not less, restrictive than any other provision of law”. The Smithtown Town Code specifically states that firearm discharge within the Town is “deemed hazardous to the general public”. The Town does make an exception to the firearm discharge prohibition to allow firearms to be discharged “on one’s own property and upon the property of another with the written consent of the landowner” and establishes a discharge setback of 500 feet which in certain ways is more restrictive than the ECL law but authorized under NY Town § 130. Similarly there is no conflict preemption within the state statutes and town code provisions since the state laws do not specifically allow anything that the town code prohibits outside of NY Town § 130 specific language allowing the Town of Smithtown to enact firearm discharge laws.

Based upon a review of the motion papers the Court concludes that the defendant has made a prima facie showing of its entitlement to judgment as a matter of law that the Town of Smithtown’s locally enacted law on firearm discharge is not illegal in nature. The plaintiffs did not rebut that presumption in their opposition or original motion papers. Accordingly, the defendant’s cross motion for summary judgment is granted and the complaint is dismissed.

This motion by the plaintiffs for an order awarding them summary judgment is denied in all respects.

The foregoing shall constitute the decision and Order of this Court.

Dated: May 21, 2018



HON. JOSEPH A. SANTORELLI
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION