TO BE ARGUED BY:
JACQUELINE A. FINK, ESQ.
TIME REQUESTED: 15 MINUTES

Supreme Court of the State of New York
Appellate Division:Second Department

HUNTERS FOR DEER, INC. and MICHAEL LEWIS,

Plaintiffs-Appellants,

-against-

TOWN OF SMITHTOWN,

Defendant-Respondent.

Appellate Division Docket No. 2018-06959

BRIEF FOR DEFENDANT-RESPONDENT

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Supreme Court, Suffolk County, Index No. 623373/2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

NATURE OF THE CASE 1

ARGUMENT

POINT I: THE PERFECTED APPEAL IS DEFECTIVE 2

POINT II: THIS COURT DOES NOT HAVE JURISDICTION OVER THE QUESTIONS PRESENTED 3

POINT III: EVEN IF THE COURT EXERCISES ITS JURISDICTION OVER THIS ISSUE, THE PLAINTIFF-APPELLANT'S ARGUMENT FAILS 4

POINT IV: JUDGE SANTORELLI CORRECTLY HELD THAT TOWN LAW §130(27) APPLIES 7

CONCLUSION 11

TABLE OF AUTHORITIES

CASES: **PAGE**

Rubens v. Fund,
23 A.D.3d 636; 805 N.Y.S.2d 640 (2d Dept. 2005) 4

Sanz v. Discount Auto,
10 A.D.3d 395, 780 N.Y.S.2d 763 (2d Dept. 2004) 4

Matter of TIG Ins. Co. v. Pellegrini,
258 A.D.2d 658, 685 N.Y.S.2d 777 (2d Dept. 1999) 4

Dannasch v. Bifulco,
184 A.D.2d 415, 417, 585 N.Y.S.2d 360 (1st Dept. 1992) 4

MHC Greenwood Village NY, L.L.C. v. County of Suffolk,
18 Misc.3d 312, 852 N.Y.S.2d 599 (Sup. Ct. 2007) 5

Matter of Zorn v. Howe,
276 A.D.2d 51, 56, 716 N.Y.S.2d 128 (3d Dept. 2000) 5

Jancyn Mfg. Corp. v. Suffolk County,
71 N.Y.2d 91 at 99 (1987) 5

Chwick v Mulvey,
81 A.D.3d 161, 915 N.Y.S.2d 578 (2d Dept. 2010) 6

STATUTES:

NY ENVIR CONSER §11-0103 5

NY ENVIR CONSER §1-0303 .....5, 6

N.Y. Town Law §130(27).....8

MISCELLANEOUS:

34 Opns St Comp, 1978 No. 78-956 p. 184 (1979).....8

1962 N.Y. Op. Atty. Gen. No. 178 (1962) 9

NATURE OF THE CASE

On December 6, 2017, Plaintiffs-Appellants, Hunters for Deer, Inc. and Michael Lewis, (hereinafter "Plaintiff-Appellant") commenced an action in the Supreme Court, Suffolk County by filing a Summons and Verified Complaint which "seeks the pre-emption of the Town of Smithtown from legislating and regulating hunting and/or firearm discharge" (R-11) alleging that "the Town of Smithtown has enacted a local law, specifically local code 'Section 160', therein establishing illegal firearm discharge setbacks and related regulations" (R-10) . Defendant-Respondent, Town of Smithtown, timely filed a Verified Answer on December 18, 2017 (R-44-46).

Plaintiff-Appellant moved for summary judgment with the filing of a motion on March 23, 2018 (R-47). In support of this motion is an Attorney Affirmation and Memorandum in Support of Plaintiff's Complaint alleging that "the subject Town of Smithtown code prohibits hunting and discharge of a firearm or bow within the geographic boundaries of the Town of Smithtown. As such, the Town of Smithtown has legislated in an area that is precluded/preempted from legislating upon, and consequently has resulted in the deprivation of the civil rights of citizens of this state, including licensed hunters" (R-13). Defendant-Respondent cross-moved on April 9, 2018 seeking an order declaring Chapter 160 of the Town Code a permissible exercise of the Town's policing powers (R-54).

By Order dated May 21, 2018 and entered on May 22, 2018, the Honorable Joseph A. Santorelli granted the Town's cross motion for summary judgment and denied Plaintiff-Appellant's motion in all respects. (R-3-8).

ARGUMENT

POINT I

THE PERFECTED APPEAL IS DEFECTIVE

Plaintiff-Appellant timely filed and served a Notice of Appeal. However, a defective Notification of Case Number was improperly filed with this Honorable Court on August 31, 2018 (R-1). This filing contains the incorrect caption, citing the First Judicial Department (rather than the Second) and listing the Plaintiff-Appellant as Hunters for Dear, Inc. (rather than "Deer"). Furthermore, the Record on Appeal contains an inaccuracy as filed. Specifically, page 1 of the Record contains a Statement Pursuant to CPLR 5531. The matter listed in this statement is Lisa Gerbino and Robert Gerbino against John Whelan et al. (R-1). Furthermore, all the statements made thereafter appear to correspond with this unrelated litigation. This is certainly not an adequate 5531 Statement for the instant matter. Finally, the attorney for the Plaintiff-Appellant, Mr. Killoran, includes a Certification pursuant to CPLR 2105 (R-70). In such, Mr. Killoran, certifies that he personally reviewed the Record on Appeal. All of these deficiencies combined, make this perfected appeal defective.

POINT II

THIS COURT DOES NOT HAVE JURISDICTION OVER THE QUESTIONS PRESENTED

Throughout the numerous points contained in his brief, Plaintiff-Appellant argues, in sum and substance, that a bow is not a firearm. However, this issue is not before this Honorable Court. Plaintiff-Appellant failed to raise this issue in his original motion papers for summary judgment. As a result, Judge Santorelli's decision does not discuss this question since it was not originally presented and is, therefore, not subject to this appeal.

Plaintiff-Appellant's first point is captioned "Judge Santorelli Overlooks the Seminal Fact that a Bow is Not a Firearm". However, a quick review of Plaintiff-Appellant's original motion papers (R-47-51) reveals that the Plaintiff-Appellant failed to make this argument. Rather, the motion for summary judgment argued that Chapter 160-5 of the Town Code prohibits hunting and discharge of a firearm or bow within the geographic boundaries of the Town of Smithtown which it is preempted by State law from regulating (R-13). Chapter 160-5 simply sets forth the discharge distances permissible within the Town's geographic boundaries.

Only after the cross-motion was filed by the Town clearly defeating Plaintiff-Appellant's original arguments, did Plaintiff-Appellant raise in his reply papers the question of whether a bow is a firearm (R-59-66). The law is well-established that

relief may not be granted in reliance upon facts raised in reply papers. Rubens v. Fund, 23 A.D.3d 636; 805 N.Y.S.2d 640 (2d Dept. 2005) *citing* Sanz v. Discount Auto, 10 A.D.3d 395, 780 N.Y.S.2d 763; Matter of TIG Ins. Co. v. Pellegrini, 258 A.D.2d 658, 685 N.Y.S.2d 777; Dannasch v. Bifulco, 184 A.D.2d 415, 417, 585 N.Y.S.2d 360. Plaintiff-Appellant had every opportunity to raise this issue in the original motion papers. This was not a question that was raised in the Town's cross-motion. Contrary to Plaintiff-Appellant's contention, Judge Santorelli did not "overlook" this issue. Rather, this issue was not appropriately raised. In fact, Judge Santorelli recognizes this deficiency holding "the plaintiffs did not rebut that presumption in their opposition or original motion papers" (R-8). Arguments advanced for the first time in reply papers are not entitled to consideration by the lower Court and are not subject to appeal to this Court.

POINT III

EVEN IF THE COURT EXERCISES ITS JURISDICTION OVER THIS ISSUE, THE PLAINTIFF-APPELLANT'S ARGUMENT FAILS

Assuming arguendo that this Honorable Court choses to consider the new question presented by Plaintiff-Appellant here on appeal, the Plaintiff-Appellant has failed to meet his burden of proof.

The novel issue raised in the appeal is "whether New York State has 'occupied the field' with respect to defining what a 'firearm', 'long bow', or 'bow' are"

(Appellant's Brief at page 11). The Plaintiff-Appellant has now changed his focus from the validity of Chapter 160-5 of the Town Code to the definitional section found in Chapter 160-2. This is a clear shift from his original motion papers.

Because Local Ordinances carry a strong presumption of validity, the burden is on the challenger to show an ordinance is preempted. MHC Greenwood Village NY, L.L.C. v. County of Suffolk, 18 Misc.3d 312, 852 N.Y.S.2d 599 (Sup. Ct. 2007); *see* Matter of Zorn v. Howe, 276 A.D.2d 51, 56, 716 N.Y.S.2d 128 (3d Dept. 2000). Just because the State and local law "touch upon the same area is insufficient to support a determination that the State has preempted the entire field of regulation in a given area". Jancyn Mfg. Corp. v. Suffolk County, 71 N.Y.2d 91 at 99 (1987).

Plaintiff-Appellant cites New York State Environmental Conservation Law, Section 11-0931(4)(a)(1)-(2). However the language quoted on page 5 of Appellant's brief is not found in that section. In fact, a review of page 51 of Appellant's brief which includes the citation referenced, clearly shows that the definition provided in the Plaintiff-Appellant's brief is not found within the materials as suggested. Further, a review of the definitional section of the Environmental Conservation Law chapter regarding fish and wildlife (NY ENVIR CONSER §11-0103) also fails to provide an express definition of firearms. Finally, the general definitional section of the Environmental Conservation Law (NY ENVIR

CONSER §1-0303) provides no definition of firearms. As there is no definition of "firearm" in the Environmental Conservation Law, how can Plaintiff-Appellant argue that they occupy the field on regulating this issue?

Next, Plaintiff-Appellant cites the Penal Law which shows its definition is inconsistent with the alleged Environmental Conservation Law (which in reality, does not provide a definition at all). These inconsistencies within the State law only further the argument that there is not one single recognized definition of the term "firearm" and thus, there is no field preemption.

Lastly, neither of the definitions quoted by Plaintiff-Appellant explicitly state that a bow is not a firearm. In fact, the Penal law goes so far as to expressly exclude an antique firearm which only begs the question why a bow was not also included in that specific exclusion?

Plaintiff-Appellant has not meet their burden proving the Town Code is preempted. Appellant has not identified legislative history or a specific statutory provision which expressly advises that the State intended to preempt the entire field of the definition of a firearm to the exclusion of all local law enactments. *See* Chwick v Mulvey, 81 A.D.3d 161, 915 N.Y.S.2d 578 (2d Dept. 2010). Plaintiff-Appellant also fails to present evidence of a comprehensive and detailed regulatory scheme in this area to demonstrate an intent to preempt local law. In fact, Plaintiff-Appellant

does just the opposite in providing an inaccurate definition allegedly from the Environmental Conservation Law that, even if it did exists, directly contradicts the definition provided in the Penal Law. Moreover, the carve out provided in Town Law §130(27) more fully detailed below, clearly illustrates the contrary intent which is to allow Home Rule.

As Plaintiff—Appellant has failed to meet his burden showing that State law has preempted the field and that a long bow is not a firearm, the sum and substance of his appeal fails.

POINT IV

JUDGE SANTORELLI CORRECTLY HELD THAT TOWN LAW §130(27) APPLIES

The remainder of Plaintiff-Appellant's argument is based on the premise that Town Law §130(27) does not permit the Town from regulating the discharge of a bow. Under the Town code, a bow is considered a firearm. Plaintiff-Appellant has failed to challenge this definition in his original motion papers and raises this new question here on appeal. Plaintiff-Appellant concedes that the Town is granted the authority, under Town Law §130(27) to regulate distance setback requirements for firearms. As detailed above, Plaintiff-Appellant has failed to prove that the Town's definition is preempted by any State law defining that a bow is not a firearm.

Without restating the arguments made in the Town's original Cross Motion, the legislature grant of authority in Town Law §130(27) specifically empowers the Town of Smithtown to enact laws related to firearm discharge when "such activity may be hazardous to the general public or nearby residents . . . which ordinances, rules and regulations may be more, but not less, restrictive than any other provision of law". N.Y. Town Law §130(27). Whether regulating the distance for a rifle or a bow, the Town is permitted to regulate distances to protect the public in densely populated areas. In fact, as Judge Santorelli appropriately notes in his Decision, the Smithtown Town Code specifically states that firearm discharge within the Town is "deemed hazardous to the general public" (R-8). This is a valid exercise of the Town's policing powers. As clearly articulated in a New York State Comptroller Opinion from 1979, "certainly, it cannot be said that the safety and well being of town residents is a matter of exclusive State concern." 34 Opns St Comp, 1978 No. 78-956 p. 184 (1979).

Plaintiff-Appellant provides an article by Gary E. Kalbaugh entitled "A Sitting Duck: Local Government Regulation of Hunting and Weapons Discharge in the State of New York". This article was provided in the original motion papers before Judge Santorelli. The Town of Smithtown submits that this article provides no legal significance and refers the Honorable Court to the cross motion by the

Town. To summarize, Mr. Kalbaugh concedes that "specified towns" (including Smithtown) "may prohibit the discharge of firearms".

Plaintiff-Appellant's argument that that the Town Code is "self-nullifying" is also without merit. Put simply, as Town Law §130(27) provides a carve out to permit more restrictive set back requirements, the Town Code provision does not violate the State Conservation Law as the restriction complies with the legislative grant of authority provided in Town Law §130(27).

As fully argued in the original motion papers before the Supreme Court and as appropriately decided by Judge Santorelli, the Town Code is not regulating hunting. A New York Attorney General Opinion from 1962 recognizes that Town Law "authorizes the town board to enact ordinances promoting the safety of the community, including the protection and preservation of safety and of peace and of good order. It might be unreasonable to have the ordinance apply to the entire area of the town because the town has no authority to regulate hunting . . . however, it is my opinion that an ordinance which regulates discharge of firearms in the populated area, but which would not by its language regulate hunting, would be valid." 1962 N.Y. Op. Atty. Gen. No. 178 (1962). The Smithtown Code in question, merely restricts firearm distances for the safety of the town. It does regulate hunting which is expressly permitted within the Town of Smithtown.

Plaintiff-Appellant resurrects another argument raised in his reply papers which is without merit. Specifically, it is argued that bow hunting is not a hazardous activity and that the deer overpopulation in the Town is more hazardous than bow hunting near dwellings. As previously stated, it is simply ridiculous to argue that the deer "epidemic" is more dangerous than bow hunting occurring within 150 feet of school buildings and homes where children are playing. This is precisely why the legislature created the exception for densely populated towns, i.e. Smithtown, via Town Law §130(27).

Last, Plaintiff-Appellant states in their final paragraph before the Conclusion that the municipality has utilized the subject code provision to issue violations against hunters who would otherwise be legally able to hunt and discharge their bows within a 150 feet "set-back" distance. Plaintiff-Appellant provides no proof of the alleged violations issued and the Town is unaware of any such instances.

CONCLUSION

In light of the foregoing, it is respectfully submitted that the May 21, 2018 Decision and Order of the Suffolk County Supreme Court should be affirmed in its entirety and that the Petitioner-Appellant's appeal of said Decision and Order should be denied as without merit.

Dated: October 19, 2018

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR § 670.10.3(f) that the foregoing brief was prepared on a computer.

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Dated: October 18, 2018

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