

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

North Valley District, Chatsworth Courthouse, Department F49

20STCV48910

MIA TRETТА, et al. vs TERRANCE J. OSMAN, et al.

June 28, 2021

8:30 AM

Judge: Honorable Stephen P. Pfahler

Judicial Assistant: Adrina Chebishyan

Courtroom Assistant: Patricia Aranda

CSR: 11843, Anita Alderson

ERM: None

Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Len Hoang Kamdang (Telephonic); Alla Lefkowitz (Telephonic) by Spencer Pahlke; Mark Weiner (Telephonic)

For Defendant(s): Sean Ferron (Telephonic); Mark T. Young by Nathaniel P Mark (Telephonic)

NATURE OF PROCEEDINGS: Hearing on Demurrer - with Motion to Strike (CCP 430.10); Case Management Conference

The matters are called for hearing.

The Court reads and considers the moving papers in support of, in opposition to and reply to the Hearing on Demurrer - with Motion to Strike (CCP 430.10)

After oral argument, the Court takes the motion under submission.

Case Management Conference is held.

The Court notes that there is no cross-complaint in this matter.

All named Defendants/Cross Defendants have been served and have appeared, been defaulted or dismissed.

Parties are ordered to meet and confer pursuant to CRC 3.724.

The Court hereby refers the matter to the Los Angeles Superior Court Mandatory Settlement Conference Program on Spring Street.

All parties demanded jury trial and will post jury fees.

Final Status Conference is scheduled for 05/12/2022 at 08:30 AM in Department F49 at Chatsworth Courthouse.

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Jury Trial (10 days) is scheduled for 05/23/2022 at 08:30 AM in Department F49 at Chatsworth Courthouse.

Order to Show Cause Re: Referral to Long Cause Court is scheduled for 04/20/2022 at 08:30 AM in Department F49 at Chatsworth Courthouse.

All documents regarding OSC Re Referral to Long Cause Trial Court are due on 04/10/2022 in Department F49.

Notice is waived as to the Case Management Conference.

LATER:

The Court adopts its tentative ruling as its final ruling as follows:

RULING

Demurrer: Overruled.

Defendant Terrance Osman dba 1911 Builders submits the subject demurrer on grounds of immunity from civil suit for criminal use of a firearm. Defendant cites to the Protection of Lawful Commerce in Arms Act (PLCAA). Defendant specifically contends no exception applies. Defendant additionally contends that the complaint fails to allege any statutory violation under the federal Gun Control Act, as Defendant never sold “completed firearms.”

Plaintiff in opposition challenges the applicability of the PLCAA on grounds that PLCAA only applies to firearms dealers with a Federal Firearms License (FFL), and defendant was unlicensed at the time of the sale. Even if the PLCAA applied, Plaintiff alleges exceptions apply, including negligent entrustment. Plaintiff additionally disputes the disclaimer of applicability to the federal Gun Control Act, and contends the sale of the components without serial numbers or conducting a background check constitutes a violation of said act.

Defendant in reply continues to challenge the characterization of the components sold constitute a “firearm” under federal statute. Even if the sale constituted a transaction within the PLCAA, and assuming the shooting constitutes a third party criminal act, Plaintiff is limited to a negligent entrustment cause of action.

A demurrer is an objection to a pleading, the grounds for which are apparent from either the face of the complaint or a matter of which the court may take judicial notice. (Code Civ. Proc., § 430.30, subd. (a); see also Blank v. Kirwan (1985) 39 Cal.3d 311, 318.) The purpose of a

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demurrer is to challenge the sufficiency of a pleading “by raising questions of law.” (Postley v. Harvey (1984) 153 Cal.App.3d 280, 286.) “In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.” (Code Civ. Proc., § 452.) The court “ “treat[s] the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law” ’ ” (Berkley v. Dowds (2007) 152 Cal.App.4th 518, 525.) In applying these standards, the court liberally construes the complaint to determine whether a cause of action has been stated. (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 733.)

PLCAA

“Ordinarily ‘[t]he proper analysis for determining the applicability of the PLCAA is two-fold,’ requiring first a determination whether the lawsuit in question is a ““qualified civil liability action”” and second an analysis whether, if it is, ‘any of the PLCAA's six exceptions to this definition apply.’” (Chavez v. Glock, Inc. (2012) 207 Cal.App.4th 1283, 1316–1317.) The qualification for a lawsuit is addressed as follows:

(4) Qualified product

The term “qualified product” means a firearm ... or a component part of a firearm ... that has been shipped or transported in interstate or foreign commerce.

(5) Qualified civil liability action

(A) In general

The term “qualified civil liability action” means a civil action ... brought by any person against a manufacturer or seller of a qualified product ... for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

...

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including--

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

...

(v) an action for death, physical injuries or property damage resulting directly from a defect in

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design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

...

(B) Negligent entrustment

As used in subparagraph (A)(ii), the term ‘negligent entrustment’ means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) Rule of construction

The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this chapter shall be construed to create a public or private cause of action or remedy.

(D) Minor child exception

Nothing in this chapter shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A).

(6) Seller

The term “seller” means, with respect to a qualified product--

(A) an importer (as defined in section 921(a)(9) of Title 18) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of Title 18;

(B) a dealer (as defined in section 921(a)(11) of Title 18) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of Title 18; or

...

(9) Unlawful misuse

The term “unlawful misuse” means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

15 U.S.C.A. § 7903

Plaintiff challenges the applicability of the PLCAA. Section 7903(B)(6) requires the “seller” conduct business with a license under the identified regulatory sections.

The term ‘dealer’ means (A) any person engaged in the business of selling firearms at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting

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special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term ‘licensed dealer’ means any dealer who is licensed under the provisions of this chapter.

18 U.S.C.A. § 921(a)(11)

The complaint alleges the sale of a firearm or components, which both qualify for applicability of the PLCAA. Nevertheless, the complaint specifically alleges Defendant was not a licensed firearms “dealer” within the meaning of the statute. [Comp., ¶ 14.] The court declines to consider any arguments regarding the represented status of Defendant as a licensed dealer for purposes of the subject demurrer. (Code Civ. Proc., § 430.30, subd. (a).) Therefore, for purposes of the subject demurrer, the complaint alleges a basis for the lack of preemption under the PLCAA.

Federal Gun Control Act

The federal Gun Control Act states in part, “It shall be unlawful—for any person—except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or” (18 U.S.C.A. § 922(a)(1)(A).) Said licensed party “shall not transfer a firearm to any other person who is not licensed under this chapter...” before the completion of a criminal background check. (18 U.S.C.A. § 922(t)(1)(A).) Federal law also requires the provision of serial numbers on firearms. (26 U.S.C.A. § 5842; 27 C.F.R. § 478.124; 27 C.F.R. § 478.125.)

The plain language of the statute requires a license for the seller of a firearm in compliance with 18 U.S.C.A. § 921, et seq. A determination of a violation depends on the definition of a firearm. “The term ‘firearm’ means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device.” (18 U.S.C.A. § 921(a)(3).)

Defendant relies on a citation to the Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives web-site allegedly advising viewers that components as sold by Defendant—“where the fire control cavity area is completely solid and unmachined”—excludes classification of the sold components as a “firearm.” Defendant therefore concludes that Plaintiff cannot allege claims based on the federal Gun Control Act.

The court declines to consider any extrinsic evidence or inference regarding alleged definitions provided on the Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives

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website for purposes of the subject demurrer. (Code Civ. Proc., § 430.30, subd. (a).) Plaintiff alleges the sale of a firearm by an unlicensed seller. [Comp., ¶ 14.] The plain language of the statute defines a firearm as a component that “may readily be converted to expel a projectile by the action of an explosive” or “the frame or receiver of any such weapon.” (18 U.S.C.A. § 921(a)(3).) The gun as described, fits the statute definition for a firearm, as either a “starter gun” to be converted into a fully operational gun, or a frame. [Comp., ¶ 14.] Plaintiff additionally and specifically alleges the sale of “kits” requiring “only 4 operations” to utilize a “fully functioning firearm.” [Comp., ¶ 43.]

The violation of the Gun Control Act occurred due to the failure of defendant to conduct a background check in order to determine whether the buyer was qualified, and the provision of the firearm without a serial number. [Comp., ¶¶ 44-46.] The complaint therefore properly alleges a statutory violation arising from the sale of a firearm.

The court acknowledges Defendant’s arguments regarding the buyer’s responsibility to obtain the serial number upon receipt of the components and completion of steps required to fire the weapon, as well as the dismissal of the necessity to conduct any background check. Nevertheless, given the argument relies on a consideration of extrinsic evidence regarding whether the components constitute a firearm or not, the court declines to consider this argument.

Plaintiff also alleges a claim for violation of the California Unsafe Handgun Act, which provides for up to one year in jail and/or a civil penalty up to \$10,000 for a party selling “unsafe” handguns. [Comp., ¶¶ 55-66.] (Pen. Code, § 32000, subd. (a).) An “unsafe handgun” is defined in the Penal Code under criteria involving certain safety and firing requirements. (Pen. Code, § 31910.) Defendant also cites to the Penal Code definition of a firearm, but Defendant fails to establish the applicability of the subject section to the California Unsafe Handgun Act, and specific definition provided. Even if the court considered this, again, the argument requires extrinsic interference beyond the scope of the demurrer.

Finally, assuming the PLCAA applies, the court considers the application of the section. Assuming Defendant was a licensed seller at all relevant times, Defendant as a provider of components, and a named party in a civil lawsuit for criminal or unlawful use of said qualified products, meets the first requirement for PLCAA application. [Comp., ¶¶ 38-43.] (Chavez v. Glock, Inc., supra, 207 Cal.App.4th at pp. 1316–1317; Iletto v. Glock, Inc. (9th Cir. 2009) 565 F.3d 1126, 1131–1132.) Defendant concedes to the applicability of this portion of the PLCAA, but specifically contends that negligence and public nuisance are not identified exceptions, thereby requiring dismissal. Defendant also presents the demurrer to the negligent entrustment cause of action, but without any specific address of the argument outside the scope of the

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PLCAA.

The plain language of the exception specifically identifies negligent entrustment. (15 U.S.C.A. § 7903(5)(B).) The complaint alleges Defendant provided components without any required background or age check, and “knew or should have know that the purchaser was unfit or incompetent to purchase or possess firearms.” [Comp., ¶¶ 18, 21, 45-48, 98.] The allegations sufficiently articulate the standard provided in the exception. The court therefore overrules the demurrer to the negligent entrustment cause of action, and continues to addresses the negligence and public nuisance cause of action.

On the negligence and public nuisance causes of action, Plaintiff relies on the argument that said causes of action fall outside the purview of the predicate qualifying exception for civil liability. Defendant specifically relies on the identified omission from the plain language of the text for the argument that negligence and public nuisance causes of action are barred. (*Ileto v. Glock, Inc.*, supra, 565 F.3d at p. 1135.) “Congress clearly intended to preempt common-law claims, such as general tort theories of liability Plaintiffs' claims—‘classic negligence and nuisance.’” (*Ibid.*)

“The PLCAA does not preempt claims against a seller of firearms for negligent entrustment or negligence per se. 15 U.S.C. § 7903(5)(A)(ii). That exception demonstrates that Congress consciously considered how to treat tort claims. While Congress chose generally to preempt all common-law claims, it carved out an exception for certain specified common-law claims (negligent entrustment and negligence per se). (Citation.) (‘[W]here ... Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’ (brackets and internal quotation marks omitted)).”

(*Id.* at p. 1136 (footnote 6).)

“The predicate exception covers causes of action that allege knowing violations of a state or federal statute applicable to the sale or marketing of firearms.” (*Id.* at p. 1136 (italics in original).) Due to the federal nature of the statute, the court specifically rejected claims from the California plaintiffs that even though California has codified rules for the subject claims of liability (Civil Code sections 1714 and 3480), the rule lacks an exception for a single state. (*Id.* at p. 1136.)

Given the dispute over the definition of firearms, licensing status and serial number requirements, the court finds PLCAA preemption arguments premature. The demurrer is

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therefore overruled for the reasons addressed prior to the specific PLCAA section.

Motion to Strike: Granted in Part/Denied in Part

Defendant challenges the claim for punitive damages based on a lack of any showing of malicious or oppressive conduct. Plaintiff counters that the allegations in the complaint sufficiently meet the legal standard for punitive damages.

Civil Code, Section 3294 authorizes punitive damages upon a showing of malice, oppression, or fraud, which are defined as follows:

- (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
- (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
- (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

Punitive damages require more than the mere commission of a tort. (See Taylor v. Superior Court (1979) 24 Cal.3d 890, 894-95.) Specific facts must be pled in support of punitive damages. (Hillard v. A.H. Robins Co. (1983) 148 Cal.App.3d 374, 391-392.) "The mere allegation an intentional tort was committed is not sufficient to warrant an award of punitive damages. [Citation.] Not only must there be circumstances of oppression, fraud or malice, but facts must be alleged in the pleading to support such a claim. [Citation.]" (Grieves v. Superior Court (1984) 157 Cal.App.3d 159, 166, fn. Omitted [emphasis added].)

Negligence based causes of action in and of themselves will not support the claim for punitive damages. Plain unintentional carelessness, characterized as negligence or recklessness, is not sufficient to support punitive damages. (Nolin v. National Convenience Stores, Inc. (1979) 95 Cal.App.3d 279, 285-286 ["Conduct classified only as unintentional carelessness, while it may constitute negligence or even gross negligence, will not support an award of punitive damages"]; G. D. Searle & Co. v. Superior Court (1975) 49 Cal.App.3d 22, 32 ("When nondeliberate injury is charged, allegations that the defendant's conduct was wrongful, willful, wanton, reckless or unlawful do not support a claim for exemplary damages; such allegations do not charge malice"); Dawes v. Superior Court (1980) 111 Cal.App.3d 82, 87 ["Inasmuch as Civil Code section 3294 requires as a prerequisite to the recovery of punitive damages that the defendant "has been guilty of oppression, fraud, or malice," the cases have uniformly recognized that proof of negligence,

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even gross negligence, or recklessness is insufficient to warrant an award of punitive damages’]; Ebaugh v. Rabkin (1972) 22 Cal.App.3d 891; McDonell v. American Trust Co. (1955) 130 CA2d 296, 300 [Awareness of a potential condition under a negligence not sufficient to support a claim for punitive damages]; see Lackner v. North (2006) 135 Cal.App.4th 1188, 1213.) The negligence and negligent entrustment cause of action alleges the failure to verify any buyer’s qualification to purchase the components and failure to include serial numbers. While Plaintiff characterizes the conduct as malicious and despicable, the negligence and negligent entrustment standard still only resonates within the nondeliberate standard. Plaintiff relies on a finding that the sale of components inevitably led to the construction of a gun then utilized in a violent criminal third party act. The provision of a dangerous component into the stream of commerce which leads to a violent criminal act is specifically excluded. (15 U.S.C.A. § 7903(5)(A)(v).)

The public nuisance cause of action however can allege a malicious element beyond the scope of negligence. (Hutcherson v. Alexander (1968) 264 Cal.App.2d 126, 136.) “Although it is not necessary to show that harm actually occurred, plaintiffs must show that a defendants acts are likely to cause a significant invasion of a public right.” (In re Firearm Cases (2005) 126 Cal.App.4th 959, 988.) The complaint alleges direct causation between the firearm acquired utilized by the shooter and its purchase from Defendant. (Id. at p. 989.) For purposes of the subject motion to strike and assuming no PLCAA preemption, the willful distribution of firearms without conducting a background check or obtaining serial numbers demonstrates a sufficient disregard of the rights and safety of others. The court therefore finds the complaint supports a claim for punitive damages based on the public nuisance cause of action.

The motion to strike is granted without prejudice on the negligence and negligent entrustment causes of action, and denied on the public nuisance cause of action.

Attorney Fees

Defendant moves to strike the claim for attorney fees on grounds of a lack of any statutory or contractual basis for the recovery of fee. Plaintiff submits no opposition to the argument on the subject claim. The motion is granted with prejudice.

Injunctive Relief

Defendant challenges the injunctive relief claim in that it only arises in the nuisance claim, which is preempted under the PLCAA. The demurrer was overruled as to the nuisance cause of action. The court declines to again consider the PLCAA for purposes of the subject motion. The motion to strike is denied.

The demurrer is therefore overruled in its entirety. The motion to strike is granted with prejudice

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as to attorney fees but is denied as to injunctive relief. On the punitive damages, the court denies the motion to strike the claim for punitive damages as it relates to the public nuisance cause of action, and grants the motion to strike without prejudice as to the negligence and negligent entrustment causes of action.

Plaintiff may amend the complaint solely for the purpose of amending the punitive damages claim with 30 days leave to amend. If Plaintiff fails to submit an amended pleading, Defendant shall answer within ten days of the lapsed amendment period.

Clerk is to give notice.

Certificate of Mailing is attached.