

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 29, 2022

8:30 AM

Judge: Honorable Stephen P. Pfahler

Judicial Assistant: Adrina Chebishyan

Courtroom Assistant: Patricia Aranda

CSR: None

ERM: None

Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Len Hoang Kamdang (Telephonic); Mark Weiner (Telephonic) by Nathaniel P Mark

For Defendant(s): Sean Ferron (Telephonic)

NATURE OF PROCEEDINGS: Hearing on Motion for Summary Judgment

The matter is called for hearing.

The Court reads and considers the moving papers in support of, in opposition to and reply to the motion.

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

LATER:

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

SUMMARY JUDGMENT

MOVING PARTY: Defendant, Terrance Osman dba 1911 Builders

RESPONDING PARTY: Plaintiff, Mia Tretta

RULING: Denied.

Evidentiary Objections: Overruled (admissible or not relied upon).

Defendant Terrance Osman dba 1911 Builders submits the subject motion for summary judgment on the basis that Defendant owed no duty of care relating to the sale of the subject ghost gun kit, as the "kit" does not meet the definition of a firearm. Because Defendant owed no duty of care, Plaintiff cannot state claims under the negligence and negligent entrustment causes of action. On the public nuisance cause of action, Defendant contends Plaintiff lacks evidence that any act or omission of Defendant constituted a substantial factor in causing harm from the

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shooting.

Plaintiff in opposition challenges the denial of any basis of duty caused by the sale of the kit to Mark Behow. Plaintiff also contends that the subject kit constitutes a firearm under federal regulations. Plaintiff additionally notes the lack of any challenge to the presented state law challenges, specifically the claims under the California Unsafe Handgun Act (CUHA).

Defendant in reply reiterates the argument that the “kit” in no way constitutes a firearm. Defendant notes changes in law requiring the addition of serial numbers and background, but such standards were not applicable at the time of sale of the subject kit. Defendant denies any basis of a general duty as a result of the kit sale. Defendant also reiterates the lack of substantial factor arguments as to the nuisance claim.

The pleadings frame the issues for motions, “since it is those allegations to which the motion must respond. (Citation.)” (Scolinos v. Kolts (1995) 37 Cal. App. 4th 635, 640-641; FPI Development, Inc. v. Nakashima (1991) 231 Cal.App.3d 367, 382-383; Jordan-Lyon Prods., LTD. v. Cineplex Odeon Corp. (1994) 29 Cal.App.4th 1459, 1472.) The purpose of a motion for summary judgment or summary adjudication “is to provide courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.” (Aguilar v. Atl. Richfield Co. (2001) 25 Cal.4th 826, 843.) “Code of Civil Procedure section 437c, subdivision (c), requires the trial judge to grant summary judgment if all the evidence submitted, and ‘all inferences reasonably deducible from the evidence’ and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” (Adler v. Manor Healthcare Corp. (1992) 7 Cal.App.4th 1110, 1119.)

“On a motion for summary judgment, the initial burden is always on the moving party to make a prima facie showing that there are no triable issues of material fact.” (Scalf v. D.B. Log Homes, Inc. (2005) 128 Cal.App.4th 1510, 1519.) A defendant moving for summary judgment “has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action . . . cannot be established.” (Code Civ. Proc., § 437c, subd. (p)(2).) “Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto.” (Ibid.)

“When deciding whether to grant summary judgment, the court must consider all of the evidence set forth in the papers (except evidence to which the court has sustained an objection), as well as all reasonable inference that may be drawn from that evidence, in the light most favorable to the

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party opposing summary judgment.” (Avivi, 159 Cal.App.4th at 467; see also Code Civ. Proc., § 437c, subd. (c).) “An issue of fact can only be created by a conflict in the evidence. It is not created by speculation, conjecture, imagination or guesswork.” (Lyons v. Security Pacific National Bank (1995) 40 Cal.App.4th 1001, 1041 (citation omitted).)

In the subject motion, Defendant seeks a ruling finding the subject kit falls outside the definition of a firearm, thereby relieving any finding of a duty to conduct a background check on the purchaser, Mark Behow. Plaintiff counters this argument by maintaining a general duty of care applies regardless of the definition of a firearm.

This general basis of duty apparently arises from the allegations in the operative complaint that potential purchasers of said kits (“ghost guns”) are people otherwise barred from legally purchasing firearms due to prior disqualification or underage status. [Comp., ¶¶ 36-37, 43, 47.] The breach was the result of the sale of the firearm without any required disclosure of age or purchase prohibiting disclosures. [Comp., ¶¶ 45-45, 48-50.]

Plaintiff establishes the lack of any protections from the Protection of Lawful Commerce in Arms Act (PLCAA) based on the admission that Defendant is not a Federal Firearms License (FFL) holder. [Declaration of Mark Weiner, Ex. F: Deposition of Terrence Osman, 32:9-11.] As previously addressed in the demurrer to the complaint, the lack of a FFL bars any protections under the PLCAA regarding duties of care from the lawful sale of firearms. (15 U.S.C.A. § 7903; (Chavez v. Glock, Inc. (2012) 207 Cal.App.4th 1283, 1316–1317.)

The court therefore considers the scope of duty based on the foreseeability allegation that Defendant engaged in the sale of “ghost guns” for the purpose of enabling the purchase of readily made firearms to persons otherwise barred from legal purchases through licensed dealers. [Comp., ¶¶ 43-48.] California specifically bars any denial of duty on grounds that the specific shooting was not specifically foreseeable, and instead considers potential criminal conduct among the factors for the finding of a duty of care. (Lugtu v. California Highway Patrol (2001) 26 Cal.4th 703, 716; Ballard v. Uribe (1986) 41 Cal.3d 564, 572 (footnote 6); Hernandez v. Jensen (2021) 61 Cal.App.5th 1056, 1065-1066; Jacoves v. United Merchandising Corp. (1992) 9 Cal.App.4th 88, 114.)

While Plaintiff broadly argues for a duty of care imposed on even “kit” sellers, given the case law relies upon the finding of an operational firearm used in the commission of a third party crime, the court first considers 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;

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(C) any firearm muffler or firearm silencer; or (D) any destructive device.” (18 U.S.C.A. § 921(a)(3).) Defendant also acknowledges California Penal Code section 16520: “As used in this part, ‘firearm’ means a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion.” (Pen. Code, § 16520, subd. (a).) “As used in the following provisions, ‘firearm’ includes the frame or receiver of the weapon...” (Pen. Code, § 16520, subd. (b).) “As used in Sections 29010 to 29150, inclusive, ‘firearm’ includes the unfinished frame or receiver of a weapon that can be readily converted to the functional condition of a finished frame or receiver.” (Pen. Code, § 16520, subd. (g).)

Notwithstanding the California Penal Code definition providing a firearm can include the unfinished frame that can be readily converted into an item capable of expelling a projectile, Defendant maintains the required finishing of the kit still renders the kit outside the definition of a firearm. Defendant describes the “80% kit” as a product that requires a minimum of eight (8) hours of machining, drilling, and assembly with tools not supplied with the kit before the completed item can be used as a firearm. [Declaration of Terrance Osman, ¶¶ 5-7.] Defendant also contends the subject “80% kit” was not declared a firearm under 18 U.S.C. § 921 upon submission of an application with the United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in 2017. [Id., ¶¶ 8-10, Ex. 2.]

Plaintiff in opposition first challenges the ATF letter as “irrelevant,” in that the ATF letter only considered the frame presented to the ATF for review, while the kit itself includes 44 parts in total utilized for completion of the item. [Osman Depo, 46:7-9; 99:14-25.] The court declines to exclude the evidence of the ATF letter, and instead addresses the purpose of the kit and expert opinion.

Defendant admits in deposition that the properly completed “kit” will allow for the creation of a fully functioning firearm capable of expelling a bullet. [Osman Depo., 59:16-60:7, 65:10-14, 71:23-72:3.] Plaintiff’s expert also confirms that the completed kit leads to an operational firearm. [Weiner Decl., Ex. E: Declaration of Joseph Bisbee, ¶¶ 27, 30.] Given the lack of argument or specific address regarding the language “may readily be converted to expel a projectile,” as provided in the federal statute, the court declines to analyze the language regarding whether the kit constitutes a firearm under federal regulations, regardless of the ATF determination or not. Defendant therefore fails to shift the burden regarding a firearm under federal law. Regardless, the plain language of the Pen. Code section 16520, subdivision (a) clearly renders the kit a firearm for purposes of determining firearm liability. (Pen. Code, § 16520, subd. (b), (g).)

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Defendant's argument depends on a finding of no imposed duty due to the sale of a non-firearm. As addressed above, the court rejects the first part of the argument in that the kit constitutes a firearm, at a minimum, under the definition provided by the State of California. Furthermore, the court finds a basis of duty imposed on Defendant based on the sale of said readily convertible kits into an operable firearm. It is reasonable and entirely foreseeable that that customers of the kits make purchases of the subject kit for purpose of evading purchase bans and/or owning a non-registered firearm. [Bisbee Decl., ¶¶ 17, 19-21, 28.] (Ileto v. Glock Inc. (9th Cir. 2003) 349 F.3d 1191, 1204-1205.) The court therefore denies the motion for summary judgment on grounds of a lack of any duty to comply with firearm regulations within the state of California.

Defendant alternatively argues that even if the court decouples the requirements for a finding of negligence from the nuisance claim, Plaintiff must still present evidence of causation in support of the nuisance claim. Defendant relies on the lack of duty argument to undermine any finding of substantial factor causation. For the reasons addressed above, the court finds the sale of the firearm without any regard to the propriety of the sale to a potentially unqualified purchasers, who may engage in criminal behavior, establishes triable issues of material fact on the issue of causation.

The motion is therefore denied in its entirety.

OSC re: Long Cause Trial set for January 9, 2023.

Clerk is to give notice.

Certificate of Mailing is attached.