UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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JAMES M. MALONEY,

Plaintiff,

- against -

ELIOT SPITZER, in his official capacity as Attorney General of the State of New York, and his successors,

Defendants.
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MEMORANDUM OF DECISION AND ORDER
03 Civ. 0786

APPEARANCES:

JAMES M. MALONEY, ESQ.
Pro Se Plaintiff
33 Bayview Avenue
Port Washington, New York 11050

ELIOT SPITZER
Attorney General of the State of New York
200 Old Country Road, Suite 460
Mineola, New York 11501
By: Dorothy Oehler Nese, Assistant Attorney General

SPATT, District Judge.

This action seeks a declaration that sections 265.00 and 265.02 of the New York Penal Law which prohibit the in home possession of nunchaku are unconstitutional as violative of the First, Second, Fifth, Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States.

Presently before the Court is a motion for summary judgment pursuant to Rule

56 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") by the Plaintiff James M. Maloney ("Maloney" or the "Plaintiff").

I. BACKGROUND

On February 18, 2003, Maloney, an attorney proceeding pro se, commenced this action pursuant to 28 U.S.C. §§ 1331 and 2201 against New York Attorney State Attorney General Eliot Spitzer ("Attorney General" or the "Defendant"), and Nassau County District Attorney Denis Dillon ("Dillon") in their official capacities seeking a declaratory judgment that the above mentioned New York State Penal Laws are unconstitutional. The Plaintiff subsequently discontinued the action against Dillon in the interest of saving the taxpayer's money.

The following facts are taken from the parties' Rule 56.1 statements and supporting affidavits and are not in dispute unless otherwise stated.

In 2000 and 2002, the Attorney General reached settlements in two civil rights lawsuits against out of state martial arts equipment suppliers which had provided a product called nunchaku to New York residents by mail order and internet sales. New York Penal Law § 265.00(14) defines nunchaku as follows:

> Chuka stick means any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking. These devices are also known as nunchakus and centrifugal force sticks.

As part of these settlements, the suppliers were required to provide the Attorney General with a list of New York customers who had purchased nunchaku from the companies. Also, the suppliers had to deliver written notice to their New York customers advising them to surrender these weapons to law enforcement agencies. The Plaintiff did not indicate whether he received such a notice.

On August 24, 2000, Maloney was arrested and charged with six violations of the New York Penal Law, including one count of criminal possession of a weapon in the fourth degree, for possessing a nunchaku in his home in violation of New York Penal law §265.01. This section states in part:

> A person is guilty of criminal possession of a weapon in the fourth degree when:
>
> (1) He possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken or "Kung Fu star" . . . .

It is undisputed that the criminal charge for possession of a nunchaku was not supported by any allegations that the Plaintiff had used the nunchaku in the commission of a crime; that he carried the nunchaku in public; or engaged in any other prohibited conduct in connection with said nunchaku except for possession in his home. Thus, the only criminal activity alleged against the Plaintiff was his possession of the nunchaku in his home.

On January 28, 2003, the Plaintiff pled guilty to one count of disorderly conduct pursuant to New York Penal Law § 240.20(7), and received a conditional discharge with regard to the other pending charges. In connection with that plea of guilty, the Plaintiff agreed to the destruction of the nunchaku that had been confiscated during his August 24, 200 arrest. The Plaintiff was also fined $310.

On February 18, 2003, the Plaintiff commenced this action. The complaint alleges that sections 265 through 265.02, insofar as they apply to the possession of nunchaku in one's home are unconstitutional and "[u]njustly restrain and deprive the Plaintiff and other residents of New York from pursuing and obtaining happiness and safety." The Plaintiff now moves for summary judgment seeking a declaration that these statutes are unconstitutional. The Defendant opposes this motion on the grounds that the Court does not have subject matter jurisdiction over this case under Article II, and the Plaintiff fails to state a cause of action for a constitutional violation.

II. DISCUSSION

A. Applicable Law

A motion for summary judgment should be granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2550, 91 L. Ed.2d 265 (1986). The moving party bears the burden of establishing the absence of a genuine issue of material fact. *See Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L. Ed.2d 202 (1986); *Niagara Mohawk Power Corp. v. Jones Chemical Inc.*, 315 F.3d 171, 175 (2d Cir. 2003) (quoting *Anderson*, 477 U.S. at 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202).

In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party and must draw all permissible inferences from the submitted affidavits, exhibits, interrogatory answers, and depositions in favor of that party. *See Anderson*, 477 U.S. 242, 255; *Vann v. City of New York*, 72 F.3d 1040, 1048-49 (2d Cir. 1995). Disputed facts that are not material to the issue at hand will not defeat summary judgment. *See Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510; *Lane v. New York State Electric & Gas Corp*., 18 F.3d 172, 176 (2d Cir. 1994).

Finally, even though the Plaintiff is proceeding pro se, he is an attorney duly licensed to practice law in the State of New York and in the United States District Court for the Eastern District of New York. As such, the Plaintiff is not entitled to the same leeway as generally afforded to pro se litigants who are not attorneys. *See Goel v. United States DOJ*., No. 03 Civ. 0579, 2003 U.S. Dist. LEXIS 15066, at *5 (S.D.N.Y. Aug. 27, 2003); *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001) ("While we are generally obliged to construe pro se pleadings liberally, we decline to do so here because [the plaintiff] is a licensed attorney.").

B. As to Standing

The Attorney General argues that the Plaintiff does not have standing to pursue this case, in part because the Attorney General is not responsible for the enforcement of the Penal Law in question. The Court agrees.

Article III of the Constitution limits federal jurisdiction to cases and controversies. Indeed, standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed.2d 351 (1992). The party invoking federal jurisdiction bears the burden of establishing the elements of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). These elements are as follows:

> First, the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

McCormick ex rel. McCormick v. School Dist. of Mamaroneck, 370 F.3d 275 (2d Cir. 2004) (quoting *Lujan*, 504 U.S. at 560-61).

To satisfy the first element, namely that there be an "injury in fact," the Plaintiff must establish that the alleged injury is concrete, particularized, and "must affect the plaintiff in a personal and individual way." *Defenders of Wildlife*, 504 U.S.

at 560 n. 1, 112 S. Ct. 2130; *see also Raines v. Byrd*, 521 U.S. 811, 819, 117 S. Ct. 2312, 138 L. Ed.2d 849 (1997) ("We have consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him."); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997). This requirement limits federal jurisdiction to real conflicts so as to "preclude the courts from gratuitously rendering advisory opinions with regard to events in dispute that have not matured to a point sufficiently concrete to demand immediate adjudication and thus may never materialize as actual controversies." *Dow Jones v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 405 (2d Cir. 2002), affd., 346 F.3d 357 (2d Cir. 2003).

In order to establish the existence of an actual controversy in an action seeking a declaration that a criminal statute is unconstitutional, the plaintiff must show either: (1) that they have been arrested, prosecuted, or threatened with prosecution under the statute at issue, or (2) that they have some reasonable fear, which is not "purely imaginative or speculative," of being prosecuted under the statute in the future. *Cherry v. Koch*, 126 A.D.2d 346, 351, 514 N.Y.S. 2d 30, 33 (1987). It is well established that a plaintiff does not have to wait until he is threatened with prosecution before he may challenge a criminal statute that directly operates against him. Doe v. Bolton, 410 U.S. 179, 188 (1973). Rather, the Plaintiff must establish only that he has "an actual and well-founded fear that the law will be enforced against it." *Vt. Right to*

Life Comm. v. Sorrell, 221 F.3d 376, 382 (2d Cir., 2000), citing Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393, 98 L. Ed. 2d 782, 108 S. Ct. 636 (1988).

In the case at bar, in addition to having already been arrested and prosecuted for the possession of nunchaku in his home, there is no dispute that he intends to posses nunchaku in his home, "provided that he may do so lawfully." Plf. Mem. In Sup. 7-8. Nevertheless, because the Attorney General, the only remaining defendant in this case, is not the party responsible for the potential prosecution of the Plaintiff, as set forth below, his motion for summary judgment against the Attorney General is denied.

In a case such as this, where a plaintiff seeks a declaration that a particular statute is unconstitutional, "the proper defendants are the government officials charged with the administration and enforcement of the statute." *Curtis v. Pataki*, No. 96 Civ. 425, 1997 WL 614285, at *5 (Oct. 1, 1997 N.D.N.Y.) (citing *New Hampshire Right to Life Committee v. Gardner*, 99 F.3d 8, 13 (1st Cir.1996) (citations omitted)). "It is well established in New York that the district attorney, and the district attorney alone, should decide when and in what manner to prosecute a suspected offender." *Baez v. Hennessy*, 853 F.2d 73, 76 (2d Cir. 1988) (citations omitted). In fact, "since 1796 the Legislature has never accorded general prosecutorial power to the Attorney General Indeed, this Court has pointed out that "the Attorney-General has no . . . general authority [to conduct prosecutions] and is without any prosecutorial power except

when specifically authorized by statute." *People v. Gilmour*, 98 N.Y.2d 126, 130, 746 N.Y.S.2d 114, 773 N.E.2d 479 (2002) (internal quotations and citations omitted). Thus, the choice as to whether to prosecute is entirely within the discretion of a district attorney. *People v. Eboli*, 34 N.Y.2d 281, 289, 357 N.Y.S.2d 435, 313 N.E.2d 746 (1974).

Although New York Executive Law § 63(3) allows " 'the head of any . . . department, authority, division or agency' to activate the Attorney General's prosecutorial powers," *Gilmour*, 98 N.Y.2d at 132 (citing N.Y. Exec. § 63(3)), in this case, there is no evidence or assertion that any such request has been made or is likely to be made in the future. Even though the Attorney General settled two civil cases with out of state martial arts retailers, the Court finds that the Attorney General has no responsibility for administering or enforcing the criminal statutes in question, and that he is not an appropriate defendant in this case.

Accordingly, the motion by the Plaintiff for summary judgment is denied on the basis that the Court has no subject matter jurisdiction over this matter because the Plaintiff has no reasonable fear of prosecution by the Attorney General

C. Leave to Amend

Rule 15(a) of the Federal Rules of Civil Procedure states that leave to amend a pleading "shall be freely given when justice so requires." In that regard, even if not requested by the Plaintiff, the Court may *sua sponte* grant leave to amend. *Straker v.*

Metropolitan Transit Authority, 333 F. Supp.2d 91, 102 (E.D.N.Y. 2004). Accordingly, the Plaintiff is granted leave to serve a supplemental summons and amended complaint against the entity responsible for the potential prosecution of the Plaintiff under the statutes in question. The Plaintiff is directed to serve and file the supplemental and amended complaint within 30 days from the date of this order.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the motion by the Plaintiff for summary judgment against the defendant Eliot Spitzer pursuant to Fed. R. Civ. P. 56 is **DENIED**; and it is further

ORDERED, that the Plaintiff is granted leave to serve and file a supplemental summons and amended complaint adding the entity allegedly responsible for the potential prosecution of the Plaintiff under the statutes in question within 30 days from the date of this order; and it is further

ORDERED, that failure to serve and file a supplemental summons and amended complaint within the specified time period will result in dismissal of this action.

SO ORDERED.

Dated: Central Islip, New York
August 31, 2005

ARTHUR D. SPATT
United States District Judge